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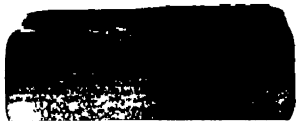

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Iowa. Laws, statutes, etc. Code

SUPPLEMENT

TO

McCLAIN'S

ANNOTATED CODE AND STATUTES

OF THE

STATE OF IOWA,

SHOWING THE

GENERAL, PUBLIC AND PERMANENT ACTS OF THE TWENTY-THIRD AND TWENTY-FOURTH GENERAL ASSEMBLIES (1890 AND 1892), WITH NOTES OF ALL DECISIONS RENDERED BETWEEN JULY, 1888, AND OCTOBER, 1892, WITH REFERENCE TO IOWA STATUTES, OR THE SUBJECTS EMBRACED THEREIN.

BY EMLIN McCLAIN, A. M., LL. D.,

CHANCELLOR OF THE LAW DEPARTMENT OF THE STATE UNIVERSITY OF IOWA.

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PREFACE.

This Supplement embraces all acts of a general, public and permanent nature passed by the two sessions of the General Assembly of Iowa — the Twenty-third (1890) and the Twenty-fourth (1892) — held since the publication of the Annotated Code in 1888. It also gives, in accordance with the plan of the original work, notes of all decisions relating to statutory subjects rendered between July, 1888, and October, 1892, by the Supreme Court of Iowa, or the Federal Courts in Iowa, or the Supreme Court of the United States in cases appealed from Iowa.

Sections of the Code of 1873, or of statutes, amended by acts of the two sessions embraced within the scope of the Supplement are reprinted as amended under the numbers (in black-faced figures) which the amended sections have in the original work, and substitutes are printed under the numbers of the sections for which they are substituted; the code numbers or the numbers of the session, chapter and section of the original statute, and the numbers of session, chapter and section of the amending or substituted section being given at the beginning of the section after the heading in black-faced type. New statutes are printed with supplementary numbering by means of letters, in the order with reference to the matter in the original work which they would properly occupy if inserted in it. Notes of decisions are placed under the number and title (in black-faced type) of the section of the principal work to which they properly relate.

The appendix contains the last apportionment acts, and the act providing for a geological survey, and also notes of cases relating to the constitution of Iowa. There are tables showing where the acts of the last two sessions are to be found in this Supplement, and a full index of the matter embraced in it.

E. McC.

IOWA CITY, IOWA,
October, 1892.

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SUPPLEMENT

TO

McCLAIN'S ANNOTATED CODE OF IOWA.

TITLE I.

THE SOVEREIGNTY AND JURISDICTION OF THE STATE; THE GENERAL ASSEMBLY, AND THE STATUTES.

CHAPTER 1.

THE SOVEREIGNTY AND JURISDICTION OF THE STATE.

3. Jurisdiction over Mississippi river.

The jurisdiction of the courts of the state does not extend to the abatement of a nuisance on an island in the Mississippi river, which is not shown to be within the Iowa boundary as fixed by act of congress: *Buck v. Ellenbolt*, 51 N. W. R., 22.

CHAPTER 3.

OF THE STATUTES.

42. References to Code.

An amendatory act from which the number and name of the chapter of the Code, which is amended, is omitted, is not invalid, even though the omission is not supplied by the secretary of state as required by this section: *State v. Shreves*, 81-615.

49. Repeal.

The repeal of a statute by an act which substantially retains the provisions of the old statute does not destroy or interrupt the binding force of such statute: *Hancock v. District Township*, 78-550.

The passage of a statute making women eligible to school offices, *held* to repeal by implication such portions of the statutes relating to contesting elections as require a contestant to show the qualification of an elector in the county: *Brown v. McCollum*, 76-479.

The amendment to § 5798 by which the number of peremptory challenges of the defendant in criminal cases was reduced from twenty to ten, *held* not a repeal but applicable to the organization of juries after it took effect, no matter when the proceeding was commenced: *State v. Shreves*, 81-615.

Construction; real property.

Where water-works were erected upon land occupied under a lease to continue as long as the works should operate, *held*, that the buildings, machinery, mains, pipes, etc., constituted real property, assessable as an entirety in the township where the main works were located: *Oskaloosa Water Co. v. Board of Equalization*, 51 N. W. R., 18.

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Computation of time.

Where sixty days from March 17th were given in which to file bill of exceptions, *held*, that a bill filed on May 17th could not be considered: *McCord v. Rafferty*, 51 N. W. R., 24.

The law does not recognize parts of a day. Therefore, *held* that notes of evidence filed with the clerk on the same day as the entry of a judgment in a contempt proceeding, but two hours later, would be deemed filed in connection with the entering of the judgment: *Small v. Wakefield*, 51 N. W. R., 35.

Section applied in determining whether a bill of exceptions was filed within the ninety days allowed therefor: *Sheldon Bank v. Royce*, 50 N. W. R., 986. And see *Ritchey v. Fisher*, 52 N. W. R., 505.

Clerk.

Where papers are prepared for the district court and the law requires them to be filed, it is unnecessary for the clerk to give his full official title, as the word "clerk" after his name designates him as the clerk of the court in which the action is brought or pending: *Wetmore v. Marsh*, 31-677.

51. Repeal of Revision.

The provisions of the Revision relating to boats and rafts was repealed by the enactment of the corresponding section of the Code on the subject. *Seippel v. Blake*, 52 N. W. R., 476.

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TITLE II.

THE EXECUTIVE DEPARTMENT.

CHAPTER 2.

SECRETARY OF STATE.

74a. Publication of official register. 24 G. A., ch. 64, § 1. The secretary of state is hereby authorized and directed to compile and publish annually, ten thousand copies of the "Iowa Official Register," to contain historical, political, and other statistics and facts, of general value, but nothing of a partisan character.

74b. Distribution. 24 G. A., ch. 64, § 2. The distribution for the year 1893 shall be as follows: To members of the Twenty-fourth General Assembly, forty copies each; the balance to be distributed to the newspapers of the state, to county and school officers, school principals, public libraries, colleges, seminaries, and state institutions, and other citizens or institutions, either private or public, at the discretion of the secretary of state. After 1893, the distribution shall be made as above, except as to the members of the general assembly, which shall be to the members last elected.

74c. Cost. 24 G. A., ch. 64, § 3. The cost of said printing and binding shall not, in any case, exceed the legal rate for like printing and binding as established by law, and the bill for the same shall be audited by the secretary of state and approved by the executive council.

CHAPTER 4.

TREASURER OF STATE.

91a. Drawing money from treasury. 23 G. A., ch. 31, § 1. All monies now appropriated or that may hereafter be appropriated by general law or by special or general act of the legislature shall be drawn in accordance with the act making such appropriation, provided that in no case shall such monies or any portion thereof be drawn before the same is needed for use within thirty days from the date of the requisition.

91b. By state institutions. 23 G. A., ch. 31, § 2. The treasurer of the several state institutions shall draw the whole or any part of any special or extraordinary appropriation for their respective institutions in accordance with the act making such appropriation provided that in no case shall the whole or any part of such appropriation be drawn until such sum or sums shall be needed for use within thirty days from the date of the requisition for the purpose of which said appropriation was made.

91c. Overdrafts. 23 G. A., ch. 31, § 3. Any treasurer of any state institution having drawn or that may hereafter draw from the state treasury a larger sum of money than is needed for use within thirty days from the date

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of the requisition for the purpose for which such appropriation was made shall forthwith refund such sum or sums to the state treasury.

91d. Certified statement. 23 G. A., ch. 31, § 4. The treasurer or other officer of any state institutions authorized to draw any appropriation made by the general assembly shall forward with the requisition for the same a certified statement of the amount of funds then in his hands and the sum or sums required for expenditure as provided by the act making such appropriation within thirty days from the time of making such requisition and such treasurer or other officer shall in the printed report made by the board or other body in charge of such institution to the governor or general assembly make a verified statement showing the dates and sums drawn by such requisitions and the total amount of such money actually paid out by him for each month of the biennial period.

CHAPTERS 6 AND 7.

PUBLIC PRINTING AND BINDING.

125. Number of reports. 22 G. A., ch. 82, § 11; 23 G. A., ch. 52, § 1. There shall be printed of the various public documents the number of copies hereinafter designated, to wit: of the biennial message, twelve thousand copies; of the inaugural address, of the biennial report of the auditor of state, of the annual report of the auditor upon insurance, of the report of the superintendent of public instruction, of the report of the agricultural college, of the report of the state board of health, and of the report of the bureau of labor statistics, six thousand copies each; of the report of the commissioners of pharmacy, five thousand copies; of the report of the railroad commissioners, five thousand copies, thirty-five hundred of which shall be bound in cloth; of the report of the secretary of state pertaining to lands, of the reports of the state visiting committee to the hospitals for the insane, the state inspector of oils, and the examiners in dentistry three thousand copies each; of the reports of the joint committees of the general assembly to visit state institutions, twenty-five hundred copies; and of all other reports, three thousand copies. *Provided* that of the reports which may be required by virtue of statutes hereafter enacted, the number of copies to be printed thereof shall, where not provided for by law, be fixed by the executive council at any number not exceeding five thousand. Of said reports five hundred copies each, of the biennial message, inaugural address, auditor's biennial report, the report of the superintendent of public instruction, agricultural college, state board of health, commissioners of pharmacy, secretary of state pertaining to lands, secretary of state's report of criminal convictions, the auditor's annual report pertaining to insurance, and the report of the bureau of labor statistics, shall be bound in cloth. All other reports shall be bound in paper covers, and reports of the legislative visiting and special committee shall be printed and stitched without covers.

[The foregoing is a substitute for the original section, and also, it seems, for the amendment made by 23 G. A., ch. 51, with reference to the report of the bureau of labor statistics.]

126. Distribution; binding. 22 G. A., ch. 82, § 12; 23 G. A., ch. 52, § 2. The secretary of state shall make distribution of the various public documents turned over to him as follows:

To the members of the general assembly six thousand copies of the message, fifteen hundred copies of the report of the auditor of state, superintendent of public instruction and agricultural college respectively, five hundred

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copies of the report of the commissioners of pharmacy, five hundred copies of the report of the secretary of state pertaining to lands, seven hundred copies of the reports of the joint visiting committee of the general assembly to the several state institutions, five hundred copies of the reports respectively of the state visiting committee to the hospitals for the insane, the state inspectors of oils and the examiners in dentistry, one thousand copies of the report of the state board of health, five hundred copies of the report of the state treasurer, veterinary surgeon, weather service, and pardons respectively; of all other reports seven hundred copies.

[The foregoing is a substitute for the first division of the original section. The other divisions of the section remain unchanged.]

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TITLE III.

THE JUDICIAL DEPARTMENT.

CHAPTER 4.

PUBLICATION OF SUPREME COURT REPORTS.

198. Contract for publication.

The acceptance of a bid does not constitute the contract required by this statute. Until the contract is entered into in accordance with the statutory requirements no contract is made, and the executive council may exercise a discretion: *Mills Publishing Co. v. Larrabee*, 78–97.

Therefore, *held*, that an action of *mandamus* would not lie to compel the executive council to enter into a contract with plaintiff whose bid had been accepted, the council having afterwards reconsidered such action and awarded the contract to another bidder: *Ibid.*

CHAPTER 5.

THE DISTRICT COURT AND JUDGES THEREOF.

206. Unauthorized person acting.

In a criminal case, *held* that the temporary absence of the judge from the court-room during the argument to the jury, and alleged misconduct of prosecuting attorney in interrupting defendant's attorney in his argument during such time and causing disorder in the court-room, were not such errors as to entitle defendant to new trial: *State v. Griffin*, 79–568.

The district court has general original jurisdiction, both civil and criminal, when not otherwise provided. But by § 698 it is provided that mayors of cities of the second class and incorporated towns shall have exclusive jurisdiction of violations of city ordinances; and the district court, therefore, has no jurisdiction of such an action: *Lansing v. Chicago, M. & St. P. R. Co.*, 52 N. W. R., 195.

214. Adjournments.

The adjournment of the January term of court in one county to a term subsequent to the holding of the February term of the court in another county of the same district, *held* valid: *In re Hunter's Estate*, 51 N. W. R., 20.

222. Records read and approved.

Signature of original draft of decree is sufficient: *Smith v. Baldwin*, 52 N. W. R., 495.

223. Approval of record at next term.

When a judgment upon a confession is entered in vacation, it should be approved and signed at the next term: *Dullard v. Phelan*, 50 N. W. R., 204.

Failure of the judge to sign the record will not invalidate the judgment: *Ibid.*

224. Amendment of record.

The action of the court in attempting to amend its record at the next term, without notice to the opposite party, will be void, but will not affect the validity of the record itself as made at the previous term: *Elsner v. Shrigley*, 80–80.

Where, in entering judgment, attorney's fees were erroneously included, *held*, that the court should have stricken such allowance from the judgment, and approved the record as thus modified: *Dullard v. Phelan*, 50 N. W. R., 204.

As between a ruling upon demurrer and one made upon final hearing, the latter will prevail, even though they are made by different judges: *Richman v. Supervisors of Muscatine County*, 77–513.

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225. Notice of correction.

Where judgment by default is rendered against one defendant, and the case continued as to others, a party against whom default is rendered is not bound by subsequent proceedings in the case: *Okey v. Sigler*, 82–94.

226. Rules.

The power of the courts at common law and under this section to make rules of practice is not taken away by the provisions of § 243, authorizing a convention of district judges to adopt uniform rules of practice throughout the whole state: *Shane v. McNeill*, 76–459.

Where, prior to the act redistricting the state, a rule was in force for a particular district, and subsequently to such redistricting the same counties constituted a district of a different number, *held*, that rules of court previously adopted in such district remained in force: *Ibid.*

The supreme court will not disturb the construction by the district court of its own rules, but will regard the construction as a part of the rule itself, settling the practice upon the point involved through the district: *Baldwin v. St. Louis, K. & N. W. R. Co.*, 75–297.

Failure to file a copy of a pleading in accordance with the rules of the court on that subject will be a ground for motion to strike the pleading from the files without showing as to prejudice: *Burgit v. Case*, 50 N. W. R., 218.

Under the rule adopted by the district judges requiring the filing of copies of pleadings, *held*, that for filing a defective copy the opposite party might have a continuance, but could have the pleading stricken from the files only in the discretion of the court when prejudice should appear: *Searles v. Lux*, 52 N. W. R., 327.

While it may be irregular to take a bill of exceptions from the files for the purpose of preparing an abstract, such act will not prevent the filing from being effectual: *Sheldon Bank v. Royce*, 50 N. W. R., 986.

Further as to rules, see § 243.

229. Judgment in vacation.

An agreement for the submission of a cause and for a decision in vacation as of the last day of the term does not have the effect of extending the time for filing the bill of exceptions: *Edwards v. Cosgro*, 77–428.

Judgments in particular cases *held* to be proper in vacation by stipulation: *Faley v. O'Malley*, 77–531; *Western Land Co. v. English*, 75–507.

235. Judicial districts; number of judges. 21 G. A., ch. 134, § 2; 24 G. A., ch. 53, § 1; 24 G. A., ch. 54, § 1; 24 G. A., ch. 55, § 1. *Second.* The second district shall consist of the counties of Lucas, Monroe, Wapello, Jefferson, Henry, Davis, Van Buren and Appanoose and shall have four judges.

Fourth. The fourth district shall consist of the counties of Cherokee, O'Brien, Osceola, Lyon, Sioux, Plymouth, Woodbury, Harrison and Monona, and shall have four judges.

Seventh. The seventh district shall consist of the counties of Muscatine, Scott, Clinton and Jackson, and shall have four judges.

[These three divisions of the original section are as amended by increasing the number of judges in each case to four.]

236a. Additional judge in second district. 24 G. A., ch. 53, § 2. Upon the taking effect of this act the governor shall appoint an additional judge for said second judicial district, who shall hold his office until the election and qualification of his successors as herein provided. At the general election in the year 1892 a judge of the district court shall be elected in said district, whose first term of office shall expire at the same time as do the terms of the present judges of said district, and thereafter the term of office of said judge shall be four years.

236b. Term of additional judge in fourth district. 24 G. A., ch. 54, § 2. The regular term of the additional district judge hereby provided for in said fourth judicial district shall commence on the first day of January, 1893, [1895] and he shall be chosen therefor at the general election in 1894, and every four years thereafter.

236c. Temporary vacancy filled. 24 G. A., ch. 54, § 3. The vacancy in the said office of district judge in said fourth judicial district created by this act shall be filled by appointment by the governor; the person so ap-

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pointed shall hold his office until the general election in 1892 and until his successor is elected and qualified, and at said general election in 1892 there shall be chosen a district judge to fill the unexpired portion of the vacancy hereby created.

236d. Arrangement of terms. 24 G. A., ch. 54, § 4. As soon as practicable after the appointment of said additional judge herein provided for, the judges of said fourth judicial district shall meet and determine the places of holding their courts during the remainder of the year 1892, and as soon as practicable after the first day of January, 1893, they shall meet and determine the places of holding their courts for the year 1893, in accordance with section 6, chapter 134, of the acts of the twenty-first general assembly.

236e. Additional judge in seventh district. 24 G. A., ch. 55, § 2. Upon the taking effect of this act, the governor shall appoint an additional judge for said seventh judicial district, who shall hold his office until the election and qualification of his successor as herein provided. At the general election in the year 1892, a judge of the district court shall be elected in said district whose first term of office shall expire at the same time as do the terms of the present judges of said district and thereafter the term of office of said judge shall be four years.

237. Place of holding court.

It is competent for the legislature to determine that terms of court may be held at places other than the county seat for the transaction of certain business and for the trial of particular classes of cases: *Milner v. Chicago, M. & St. P. R. Co.*, 77–755.

Therefore, the establishment of a district court at Avoca, with power to try cases arising in a certain designated part of Pottawattamie county, is not repugnant to § 6, article 5, of the constitution: *Ibid.*

243. Rules of practice.

This section does not abrogate the common-law authority of the courts to make rules of practice, nor repeal the provisions of § 226 conferring such authority upon the judges of the respective districts: *Shane v. McNeill*, 76–459.

The rule with reference to final settlement of administrators, guardians, etc., *held* within the authority of the judges to adopt: *Van Aken v. Coldren*, 80–254.

As to rules, in general, see § 226 and notes.

246. Review of appointment of guardian.

The action of the court with reference to the appointment of a guardian of the person and property of a minor is reviewable only on errors assigned: *Lawrence v. Thomas*, 51 N. W. R., 11.

CHAPTER 6.

GENERAL PROVISIONS.

253. Disqualification of judge.

A judge who is uncle to one of the parties to an action is within the prohibited degrees of consanguinity and is disqualified from presiding at the trial, except by mutual consent of parties: *Chase v. Weston*, 75–159.

Where the judge was related within the prescribed degree to plaintiff, but it appeared that defendant, with knowledge of that fact, entered into a stipulation by which plaintiff should not take change of venue, and went to trial without objection to the judge, *held*, that he thereby waived objection on that ground, and the disability was removed by mutual consent: *Stone v. Marion County*, 78–14.

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CHAPTER 7.

CLERK OF THE DISTRICT COURT.

257. Records consist of.

The memoranda of a judge entered in his docket are not part of the record, but they are admissible in evidence to prove a judgment or order which has been lost or destroyed: *Jones v. Field*, 80-281. And see *Jamison v. Weaver*, 51 N. W. R. 65.

In a particular case, *held*, that there was no conflict between such minutes and the decree of the court: *Burroughs v. Ellis*, 76-649.

258. Books kept.

It is a common practice to keep records, other than the ordinary journals of the court, in which judgments by confession and by default are entered, and such practice has been sustained: *Brown v. Barngrover*, 82-204.

Judgment entries, and even entries in the judgment docket, without other parts of the record, may be introduced in evidence, and will be presumed to have been in accordance with the pleadings and the evidence, unless the contrary is made to appear: *American Emigrant Co. v. Fuller*, 50 N. W. R., 48.

Under the facts of a particular case, *held*, that the variance between the names "Van Nortrick" and "Van Nortwick" was not sufficient to prevent a former adjudication from being considered a bar to a subsequent action: *Mallory v. Riggs*, 76-748.

Where a *nunc pro tunc* judgment *in rem* was substituted for a personal judgment rendered twelve years before in an attachment proceeding, and the defendant, who had previously conveyed his interest in the land, was served by publication, *held*, that the *nunc pro tunc* judgment was not available against the defendant's grantee, because notice upon the defendant by publication was unauthorized, as he had no interest in the land, and as the grantee was not made a party to such proceeding her rights were in no way affected by it: *Cassidy v. Woodward*, 77-354.

Where an entry was made of the suggestion of the death of plaintiff and the substitution of his administrator, the name of the administrator being left blank, and afterwards by *nunc pro tunc* order the name of the administrator was inserted, *held*, that such correction was proper: *Maish v. Crangle*, 80-650.

In a particular case, *held*, that an entry in the probate court of the allowance of a claim which was duly filed and proved might be made *nunc pro tunc*: *In re Estate of Seavey*, 82-440.

In a particular case, *held*, that evidence was sufficient to justify the court in correcting and making of record by a *nunc pro tunc* entry a prior order in a probate case as to the distribution of assets: *Jones v. Field*, 80-281.

When the record entry is lost or destroyed, the judgment may be shown by secondary evidence; and memoranda of a judge entered in his docket, when duly authenticated, may be considered as evidence of what the judgment was: *Ibid.*

The purpose of the index of liens is to give notice of the incumbrance; and where a judgment is not indexed, a purchaser without actual notice is not bound thereby: *Ætna Life Ins. Co. v. Hesser*, 77-381.

A purchaser is entitled to rely upon the "index of all liens," and is not required to pursue inquiry through other indexes: *Ibid.*

Therefore, where the index showed a judgment against J. H. Hesse instead of J. H. Hesser, and it appeared that the clerk changed the name by adding "r" to the former name after a subsequent mortgage was executed, *held*, that such change was unauthorized and illegal, and as the index failed to show a judgment against J. H. Hesser the mortgage was the superior lien: *Ibid.*

Further, as to the records, see §§ 223, 224, 225, 229, and notes.

261. Memorandum of filing.

A paper placed with the files, but not marked filed by the clerk, and not entered on the appearance docket, cannot be made a part of the pleadings in the case by a *nunc pro tunc* order, after judgment: *Winkleman v. Winkleman*, 79-319.

Where pleadings were properly filed in probate under the circuit court system, and subsequently the issues in the case were transferred to the equity docket, and the case was pending in the district court, the circuit court having been abolished, *held*, that the pleadings thus filed should be considered without refiling: *Ibid.*

A bill of exceptions which has been signed by the judge and handed to the clerk to be filed is filed in contemplation of law, even though the clerk has failed to properly indorse the fact that it has been filed: *Foster v. Hinsen*, 75-291; *Sheldon Bank v. Royce*, 50 N. W. R., 986.

The minutes of the testimony taken before the grand jury are to be deemed filed when delivered to the court to be kept as part of the records, and indorsement of such filing is not essential, nor that a memorandum of the filing be made in the appearance docket: *State v. Craig*, 78-637.

Short-hand notes of testimony left upon the clerk's desk *held* to be filed within the terms of § 4746, with reference to preserving the evidence in a contempt proceeding: *Small v. Wakefield*, 51 N. W. R., 35.

As to rules of court with reference to filing copies of pleadings, see notes to § 226.

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264. Report of criminal returns. 203; 22 G. A., ch. 82, § 40; 24 G. A., ch. 41. The clerk of the district court is required to report to the secretary of state, on or before the first Monday in November of each year, the number of convictions for all crimes and misdemeanors in that court in his county for the year preceding; and such report shall show the character of the offense and the sentence of punishment; the occupation of the convict, whether he can read and write, his general habits, and also the expenses of the county for criminal prosecutions during the year, including, but distinguishing, the compensation of the district [county] attorney. [R., § 349; C., '51, § 148.]

[As amended, in regard to the time for making report.]

CHAPTER 8.

COUNTY ATTORNEY.

268. Duties.

The printing of abstracts on appeal in criminal cases, prepared by the county attorney, should be paid for by the state, and may be allowed and paid by the executive council upon application: *State v. Billings*, 81–566.

270. Associate counsel.

In a proper case, the court may permit an attorney to assist in the prosecution of an indictment, without regard to the fees charged, even though he may not be employed by the supervisors, and is not a deputy of the county attorney: *State v. Shinner*, 76–147.

This section does not prohibit a prosecuting witness or party complaining from employing counsel, with the approval of the court and county attorney, to assist in the prosecution of a criminal case, and in the absence of such prohibition the rule is the same as that in force before its enactment: *State v. Shreves*, 81–615.

The right of the board of supervisors to employ counsel on behalf of the county does not depend upon the consent of the county attorney nor upon his willingness or ability to appear for the county: *Taylor County v. Standley*, 79–666.

The board of supervisors does not have an absolute discretion as to the compensation to be allowed associate counsel, and after the claim has been presented the attorney entitled to compensation is not under obligation to accept the amount allowed, but may resort to the courts for determination of the question as to how much he is entitled to receive: *Stone v. Marion County*, 78–14.

Where the attorney selected agrees to render specified services for an agreed compensation, and afterwards performs services in excess of what he was required to do by the agreement or of a character not required by it, he will be entitled to recover for such extra services: *Ibid.*

272. No other compensation.

This section does not create a limitation upon the compensation to be paid county attorneys, and such attorney is entitled to the attorney's fees taxed in an injunction suit brought by him to abate a nuisance in the illegal sale of intoxicating liquors, in addition to his other compensation as county attorney: *Farr v. Seaward*, 82–221.

277. Salary.

Where the salary of a county attorney was fixed at one-half the amount he should receive under a mistake as to the fees he would receive in criminal cases, and the board of supervisors, at a subsequent meeting, increased the salary, *held* that, the salary of the county attorney having been fixed according to the provisions of this section, it could not be increased during his term of office: *Goetzman v. Whitaker*, 81–527.

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CHAPTER 9.

ATTORNEYS AND COUNSELORS.

289. Duties; liability; compensation.

The law governing the conduct of attorneys is well defined and requires the utmost good faith: *Prouty v. Bullard*, 77–42.

Where an attorney, having connection with property as representing the plaintiff in the foreclosure of a mortgage thereon, advised his client as to the amount necessary to pay the taxes for the last year then due thereon, provided they would be paid by a certain time, and subsequently one of them took by assignment a certificate of sale of the land for prior taxes, as to which they had not advised their client, *held*, that by such assignment the partner became trustee for his client, and could not transfer such tax title free from the trust: *Lynn v. Morse*, 76–665.

An attorney cannot purchase, as against the interest of his client, a judgment, the enforcement of which he was employed to defeat; but where the clients were husband and wife, and the husband's land was about to be sold to satisfy a judgment against him, and the attorney bought the judgment, under an agreement with the husband that he should hold it as security for the repayment of the money, and that it should be the first lien on the premises, and a mechanic's lien suit by the wife against her husband, which was pending, should be dismissed, *held*, that the transaction was valid, and the money not being repaid as agreed, nor the lien dismissed, the attorney was authorized to take execution on the judgment assigned to him, and to purchase the premises, and the title thus obtained should be superior to the title obtained by the wife under a foreclosure of the mechanic's lien: *Baker v. First Nat. Bank*, 77–615.

Improper conduct of attorneys in appearing for a party in the case after having been consulted by other parties in the same case is not a ground for reversing the action of the lower court on appeal: *Shoemake v. Smith*, 80–655.

A decision under the provisions of § 4120, authorizing a summary determination, on motion, of the liability of an attorney for money collected, constitutes an adjudication, and a discharge of the attorney in such proceeding will bar subsequent action by the client, to collect the money in controversy: *Hawk v. Evans*, 76–593.

In an action against an attorney on an express promise to pay for the conversion of a note left with him for collection, *held*, that plaintiff could not recover on an implied promise growing out of defendant's tort: *Aultman v. Goldsmith*, 51 N. W. R., 43.

Where an attorney undertook to prosecute an appeal but failed to take the steps necessary, and the appeal was dismissed by motion in the supreme court and the printing fee taxed to the client, *held*, that the client might recover damages from the attorney for negligence: *Jamison v. Weaver*, 81–213.

Also *held*, that failure of the client to furnish the money necessary to pay the expenses incident to the appeal was not an excuse if it appeared that the client was ready to pay any amount necessary and was not advised by the attorney that any payment was required: *Ibid.*

The costs taxed in the supreme court under such circumstances must be regarded as the direct result of the negligence of the attorney. While costs of the appeal might have been taxed to the appellant even had the appeal been properly prosecuted, yet, such a result would have been a different one from that occasioned by failure to prosecute the appeal: *Ibid.*

Where an attorney performs legal services for a client with the knowledge and consent of such client, who receives the benefit thereof without objection, the attorney will be entitled to recover the reasonable value of such services without regard to a contract therefor between such client and another by virtue of which such services are to be rendered, unless such agreement was known to the attorney before rendering the services: *Hudspeth v. Yetzer*, 78–11.

Therefore where defendant had a contract with plaintiff's father by which legal services were to be rendered by plaintiff and his father, and compensation was to be made therefor by indorsement of credits upon notes held by defendant against plaintiff's father, *held*, that in the absence of proof that plaintiff had knowledge of such contract he could recover from defendant the reasonable price of such services thus rendered by him: *Ibid.*

A law does not imply liability of the husband to attorney's fees for services rendered to the wife in a divorce proceeding brought by her in which she is unsuccessful and which was not necessary for her protection: *Sherwin v. Maben*, 78–467.

291. Power; authority; agreement.

Where an attorney of two defendants accepted service of notice addressed to him as attorney of both, signing himself only as attorney for one, *held*, that the acceptance was binding as to both: *Walker v. Abbey*, 77–702.

The court is not required to accept an administrator's bond with an attorney as surety: *Cuppy v. Coffman*, 82–214.

Where the same attorneys represented two parties plaintiff, one of them being the party who originally brought the suit and the other being a defendant who, on motion, had been made co-plaintiff, and a notice of appeal directed to the original plaintiff, or his attorneys, naming them, was accepted by such attorneys as attorneys for plaintiff, *held*, that

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such action on their part did not constitute acceptance of service of notice by the coplaintiff: *Goodwin v. Hilliard*, 76–555.

Held, that an agreement by an attorney waiving the right to appeal was authorized: *In re Heath's Will*, 48 N. W. R., 1037.

An attorney may compromise a pending suit: *Martin v. Capital Ins. Co.*, 52 N. W. R., 534.

Agreements of attorneys not reduced to writing or made of record will not be considered: *Taylor v. Chicago, M. & St. P. R. Co.*, 80–431.

Affidavits of counsel as to oral agreements and understandings between them must be disregarded so far as they are in conflict: *Hardin v. Iowa R. & Const. Co.*, 78–726.

An oral agreement by counsel, that a case shall be submitted upon appeal on appellant's abstract, and transcript waived, cannot be established by affidavits of appellant's attorneys: *Riegelman v. Todd*, 77–696.

The supreme court will not act upon a statement of counsel as to the effect of an oral agreement as to introduction of depositions: *Borland v. Chicago, M. & St. P. R. Co.*, 78–94.

It is not competent to prove a disputed verbal agreement for the continuance of a cause made with an attorney, by the testimony of an adverse party or his attorney, but it may be proven as against a party by the testimony of his attorney who made it: *Council Bluffs L. & T. Co. v. Jennings*, 81–470.

The only evidence receivable to show a contract by an attorney in regard to the submission of a case binding upon his client is his written agreement or an entry of record: *Searles v. Lux*, 52 N. W. R., 327.

293. Lien.

Two classes of liens are recognized at common law in favor of attorneys, namely, a retaining lien and a charging lien. A party owing money is not bound by a charging lien, unless notified thereof. This section of the statute is a substantial enactment of the common law in this respect, and adds nothing thereto except the provision as to giving notice on the judgment docket. No such notice having been given at the time of the assignment of the judgment, the lien does not attach to the judgment as against the assignee: *Jennings v. Bacon*, 51 N. W. R., 15.

CHAPTER 10.

JURORS.

308. Summoning.

This provision as to summoning jurors is not applicable to grand jurors at a subsequent term to that at which they are first summoned to appear, and during the same year: *State v. Standley*, 76–215.

309. Number.

The amendment to this section, with reference to the number of grand jurors, is not unconstitutional, as not being of uniform operation: *State v. Standley*, 76–215.

The amendment to this section *held* applicable to juries impaneled in January, 1887, although the venire for such jurors was issued and served prior to January 1st of that year: *Ibid.*

The provision that when the grand jury consists of five members an indictment may be found upon the concurrence of four jurors is not in conflict with the constitution, on the ground that it authorizes an indictment to be found by less than the smallest number of which the grand jury can be composed: *State v. Salts*, 77–193.

310. Filling panel.

This statute is directory so far as it involves the right to challenge a juror, because of the failure of the court to order a second drawing of jurors. It does not provide that the court shall delay the trial of jury causes until the drawing can be made and officers be sent to distant parts of the county to bring in additional jurors: *State v. Rockwell*, 82–429.

317. Term of service.

Refusal to exclude a juror, on the ground that he has been a grand juror within a year, cannot be reviewed on appeal, where the record does not show that the person challenged has so served, not being of the regular panel, within the terms of this section: *State v. Standley*, 76–215.

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319. Drawing.

While the provisions of the law in regard to the mode of obtaining jurors are directory, yet the drawing should be in substantial conformity to the provisions of the law; and where the officer in selecting the grand jury, instead of putting the requisite number of names copied from the list into a box, placed therein as many envelopes as there were townships in the county, each envelope containing the names returned from that township, and drew twelve of such envelopes (twelve being the proper number of names to be drawn in that county, from which the grand jury should be selected), and thereafter drew one name from those contained in each envelope (thus securing the twelve persons from whom the grand jury were to be selected from different townships), *held*, that the drawing was irregular, and the indictment found by the grand jury thus selected should be set aside on motion: *State v. Beckey*, 79–868.

321. Summoning grand jurors.

Grand jurors are not summoned except for the first term of the year in which they are required to serve, and may at subsequent terms be required to appear, and may lawfully transact business, on the first day of the term: *State v. Standley*, 76–215.

CHAPTER 13.

COMMISSIONERS IN OTHER STATES.

357. Compensation.

This rule as to fees of commissioners does not apply to other officers taking depositions in another state: *McNider v. Sinine*, 51 N. W. R., 170.

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TITLE IV.

COUNTY, TOWNSHIP, TOWN AND CITY GOVERNMENT.

CHAPTER 1.

COUNTIES.

366. Organization.

Courts will take judicial notice of the organization of counties: *Hilliard v. Griffin*, 72–331; *Pitts v. Lewis*, 81–51; *Ellsworth v. Nelson*, 81–57.

372. Submission of question of changing county seat.

The action of the board on a petition presented cannot be prevented by injunction: *Luce v. Fensler*, 52 N. W. R., 517.

376, 377. Funding bonded indebtedness.

[By 23 G. A., ch. 26, and 24 G. A., ch. 16, the provisions of these sections are extended to indebtedness existing on the 1st day of April, 1892.]

383. Refunding indebtedness of counties, cities and towns.

[By 24 G. A., ch. 17, the provisions of this section as amended are extended to any bonded indebtedness outstanding at the time of the passage of the act, which was approved March 25, 1892.]

See *Ætna L. Ins. Co. v. Lyon County*, 44 Fed. R., 329.

CHAPTER 2.

BOARD OF SUPERVISORS.

400. Special meetings.

Six days' notice to each member of the board of supervisors of a special meeting is not required when it is personally served, but only when it is left at his residence; and one week's notice is not necessary when it is given by publication, but only when such notice is posted, in cases where no newspaper is published: *Supervisors v. Horton*, 75–271.

Where certain members of the board of supervisors were present at a special meeting and protested against the validity of the meeting, but subsequently participated in the meeting, *held*, that they were estopped from afterwards questioning the sufficiency of the notice: *Ibid.*

Where notice is by publication, it is not a necessary condition to a legal meeting that each subscriber receive a copy of the paper containing the notice: *Ibid.*

Where a board of supervisors at a regular meeting ordered the construction of a bridge, and appointed a committee to contract for the same, but at a subsequent special meeting rescinded the order and entire action in regard to the bridge, *held*, that they had a right to reconsider their action at the special meeting, and the committee appointed to contract for the building of the bridge had acquired no rights which they could urge against such action: *Ibid.*

402. Powers.

A county is not liable for the cost of printing abstracts for appeal in criminal cases, whether prepared by the county attorney or the attorney-general, and the same should not be allowed by the board of supervisors, but they should be paid by the state upon an allowance by the executive council: *State v. Billings*, 81–566.

One who has been confined in the county jail cannot recover damages against the county by reason of the fact that the jail was kept in an unhealthy, filthy, unventilated and improper condition: *Lindley v. Polk County*, 50 N. W. R., 975.

The board cannot make a valid contract with the county treasurer to allow him a per cent. of interest and penalties on delinquent personal property taxes, for their collection Such a contract is contrary to public policy: *Adams County v. Hunter*, 78–328.

Knowledge and acquiescence by a majority of the members of the board, in a contract which the board might make, does not give rise to either an express or implied contract.

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To show a ratification of such a contract by the board, so as to bind the county, knowledge and acquiescence by the board as such must be established: *Fouke v. Jackson County*, 51 N. W. R., 71.

Where a board of supervisors took action in regard to the building of a bridge at a regular meeting, *held*, that it had power to afterwards reconsider the action at a special meeting: *Supervisors v. Horton*, 75–271.

Business imposed upon the board of supervisors may be transacted as properly at a special as at a regular meeting, excepting in cases where, from the nature of the business, or the provisions of law in regard to it, the purpose or policy of the law, or the rights of others, require that it be done at a regular meeting: *Ibid.*

While municipal corporations have power to erect such bridges as public convenience may require, within their respective counties, they are not authorized to construct bridges over navigable waters without express legislative enactment: *Snyder v. Foster*, 77–638.

The county board is not required to assume that a bridge will be used in an unusual and extraordinary manner, either by passing in great speed or by passage of a large weight. Its liability stops with constructing and maintaining its bridges so as to protect them against injury by a reasonable, proper and probable use thereof, in view of the circumstances, such as the extent, kind and nature of the travel and business on the road of which it forms a part: *Yordy v. Marshall County*, 80–405.

But the court cannot declare as matter of law that the passage of a steam thresher is not to be anticipated, and therefore that it is not negligence not to make provision for such traffic. It is for the jury to determine whether the county is guilty of negligence in not maintaining the bridge in a safe condition for the passage of such machine, and whether plaintiff was guilty of negligence in attempting to move such apparatus across the bridge under the circumstances: *Ibid.*

Where the county erects a barricade and notice at a dangerous bridge, and the barricade is moved without the knowledge or consent of the county, it is not liable for damages which result from such removal unless it is notified thereof, or in the exercise of reasonable diligence should have known of such removal in time to have prevented the accident. The county is required to use the care which might be expected of a prudent and reasonably diligent person under similar circumstances in the management of his own affairs: *Wiers v. Jones County*, 80–851.

Where it is claimed that the place where an accident occurs is an approach to a bridge in such sense as to be a part of it, the question as to whether it is or not is for the jury. An approach having the character of a highway rather than a structure to aid approach to the bridge cannot be regarded as a part of the bridge. There is an obvious distinction between an approach having the character of a highway, or of an independent structure, and an embankment, wall, or other structure intended alone for an approach to the bridge: *Newcomb v. Montgomery County*, 79–487.

In a particular case, *held*, that there was such contributory negligence on the part of a person killed by falling from a bridge that no recovery could be had, although it was claimed that the bridge was defective by reason of the absence of any railing between the spans: *Dale v. Webster County*, 76–870.

Where the people of a county had by vote authorized the erection of a court-house, and an expenditure of $75,000 for that purpose, and plaintiff contracted to build it for that amount, according to certain plans and specifications, but the contract provided for possible changes in the plans and specifications, the cost of which was to be added to or deducted from the amount agreed to be paid for the building, and the changes which were made added materially to the contract price, and no corresponding reductions were made, *held*, that all agreements whereby the total cost of the work was to exceed the amount authorized to be expended were void, having been made in excess of the authority of the board of supervisors, and that plaintiff was not entitled to recover anything on such contracts; and the fact that the county was compelled to vote an additional $50,000 for the completion of the building could not be construed to be a ratification of the illegal acts of the parties in making the contracts: *King v. Mahaska County*, 75–829.

And in such case *held*, that the county might insist that all money paid was paid on the original contract, and not on the illegal modification: *Ibid.*

416. Tax for relief of soldiers and sailors and families.

[By 24 G. A., ch. 69, § 1, the rate of levy is changed from three-tenths to five-tenths.]

418. Soldiers' relief commission.

[By 24 G. A., ch. 69, § 2, the rate of levy is changed from three-tenths to five-tenths.]

428. Publication of proceedings.

The intention of the amendment to this section is to give the aggrieved publisher the right to appeal in all cases from the action of the board in determining the newspaper in which publication shall be made, and not merely in cases where fraud is charged: *Brown v. Lewis*, 76–159.

The fact that the board had not previously fixed a day for the filing of statements and hearing of evidence in regard to them, *held* not to deprive a hearing actually had, in which the applicants protested, of the character of a contest. The provision in regard to naming a day for the filing of statements is designed for the benefit of the applicants, and may be waived by them: *Cory v. Hamilton*, 51 N. W. R., 54.

Objections should be made when the state-

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ments are opened, and objection on the ground of fraud in such statements should not be postponed until the selection is made: *Ibid.*

Where a newspaper was selected to do the county printing, subject to a contest, and at the time fixed for the determination of the contest one of the supervisors was absent and there was a tie vote on a motion to proceed with the contest, and on a subsequent day there was a tie vote on a motion to dismiss the contest, *held*, that the first action had the effect of postponing the matter, and the second left it still pending, and as there had been no final action upon the contest, no appeal could be taken: *Hoxie v. Shaw*, 75–427.

Although it is provided that the supervisors shall select the newspapers to do the printing at the January term, final action upon a contest may be taken at a subsequent term, when by reason of the absence of one of the supervisors, causing an equal division of the board, the matter cannot be disposed of until the entire board is present: *Ibid.*

The circuit court having been abolished, an appeal under this section lies to the district court: *Starr v. Ingham*, 51 N. W. R., 175.

Such appeals are governed by the provisions of §§ 4825 and 4829 relating to appeals from judgments of justices of the peace, and must therefore be taken within twenty days and by the filing of an appeal bond: *Ibid.*

433. Rate of special tax to be voted. 312; 23 G. A., ch. 32, § 1. The rate of tax shall in no case be more than one per cent. on the county valuation in one year. When the object is to borrow money for the erection of public buildings as above provided, the rate shall be such as to pay the debt in a period not exceeding ten years; *provided*, that in counties having a population of forty thousand or over and where it is proposed to expend one hundred thousand dollars, or over, the rate of levy shall be such as to pay the debt in not exceeding twenty-five years. When the object is to construct, or to aid in constructing, any highway or bridge, the annual rate shall not be less than one mill on the dollar of valuation, and any of the above taxes becoming delinquent shall draw the same interest with the ordinary taxes. [R., § 253; C., '51, § 117.]

[As amended by inserting the proviso.]

433a. Terms of bonds. 23 G. A., ch. 32, § 2. In issuing bonds for such indebtedness when voted, the board of supervisors may cause portions of said bonds to become due at different definite periods. But none of such bonds so issued shall be due and payable in less than five or more than twenty-five years from date.

433b. 23 G. A., ch. 32, § 3. All acts and parts of acts in conflict with this act are hereby repealed.

CHAPTER 4.

COUNTY TREASURER.

458. Duties and liabilities.

Where it was claimed that a treasurer had represented to the board of supervisors that a certain portion of the general school fund had been paid to the district township entitled to it, and by such representation had obtained credit for the amount, which had not in fact been paid, in an action upon the treasurer's bond to recover the amount, *held* that, if the money were in the treasury, a warrant duly countersigned would be essential to entitle plaintiff to recover it from the treasurer, but it was not essential to a recovery from one who had obtained it by such false representations: *District Township v. Espeset*, 75–500.

In an action to recover money belonging to the county, which had been fraudulently obtained from the treasurer of the county by defendant and converted to his own use, *held*, that the remedy upon the treasurer's bond was not exclusive and that suit was properly brought against defendant: *Taylor County v. Standley*, 79–666.

Where the county treasurer collected taxes voted in aid of a railroad and neither paid them to the railroad company nor to his successor in office, and his bond was conditioned that he should "promptly pay over to the person or officer entitled thereto all money that shall come into his hands by virtue of said office," *held*, that the railroad company was the proper party to bring an action on the bond under § 3757: *Cedar Rapids, I. F. & N. R. Co. v. Cowan*, 77–535.

A railroad company entitled to the proceeds of a tax paid into the treasury may recover the amount thereof on the bond of the treasurer to whom the money is paid. The company cannot maintain *mandamus* against the successor of such treasurer who has never received the money collected: *Ibid.*

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CHAPTER 5.

COUNTY RECORDER.

471a. Vacancy filled. 23 G. A., ch. 49, § 1. In case of vacancy occurring in the office of county recorder by death or otherwise, the county auditor is required to discharge the duties pertaining to said office until such vacancy shall be filled by appointment made by the board of county supervisors.

CHAPTER 7.

CORONER.

485. Service of process.

Under this section, a deputy of a sheriff who is a party to the case is disqualified for impaneling the jury. Such officer in calling jurors into the box is enforcing process of the court within the meaning of the statute: *Gollobitsch v. Ranibon*, 51 N. W. R., 48.

In such case, the deputy is also disqualified from serving a notice to take depositions: *Ibid.*

CHAPTER 9.

TOWNSHIPS.

516. Suits by.

A township clerk may maintain a suit to recover money to which he is entitled by virtue of his office, such as road funds: *Long v. Emsley*, 57–13.

Township trustees have no authority to maintain an action to recover from the county money paid out by them in the discharge of their duties as a board of health. They are not entitled to such funds and are not the real parties in interest: *Sanderson v. Cerro Gordo County*, 80–89.

518a. Changing boundaries. 23 G. A., ch. 25, § 1. Where the boundaries of any city have been changed as provided by chapter one of the acts of the Twenty-third General Assembly of the state of Iowa, entitled an act to extend the limits of cities, and for other purposes incident thereto, the board of supervisors of the county in which such city is situated shall have power to change the boundary lines of townships so as to make such lines conform to the boundaries of such city, and to make such other changes in township lines and the number of townships as they may deem necessary. Providing nothing herein contained shall affect the present boundaries or existing conditions of school districts.

518b. 23 G. A., ch. 25, § 2. All acts or parts of acts in conflict herewith are hereby repealed.

526a. Officers of, in certain cities. 24 G. A., ch. 10, § 1. The offices of township clerk and township trustee are abolished in cities having a population of less than seven thousand, *provided*, that such cities constitute one civil township, the boundary lines of which coincide throughout with the boundary lines of such city.

526b. Duties transferred. 24 G. A., ch. 10, § 2. After this act goes into effect, the duties required by law of the township clerk in such cities, shall be performed by the city clerk; and the duties required by law, of the board of trustees in such cities shall be performed by the city council.

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526c. Assets. 24 G. A., ch. 10, § 3. The moneys and assets belonging to such civil township shall become the moneys and assets of the cities in which the said civil townships are situated; and it is hereby made the duty of the township clerks to turn such moneys and assets over to the city treasurer, to be disbursed under bond, by such city in the same manner and for the same purposes as required by law for the disposition of township funds; and such cities shall assume all liabilities of the civil township to which the provisions of this act shall apply.

526d. Funds turned over. 24 G. A., ch. 10, § 4. County treasurers are hereby authorized to pay over to the city treasurers, which come under the provisions of this act, all moneys collected for the road fund, or other funds which would otherwise be paid over to the towship clerks of such townships.

526e. 24 G. A., ch. 10, § 5. All acts or parts of acts in conflict with this act are hereby repealed.

528. Assessors.

[As to assessment districts in certain cities of the first class, see 23 G. A., ch. 8, *infra*, §§ 798a.]

530. Place of election. 391; 23 G. A., ch. 27. The trustees shall designate the place where elections will be held, and whenever a change is made from the usual place of holding elections in the township, notice of such change shall be given by posting up notices thereof in three public places in the township, ten days prior to the day on which the election is to be held. And the board of supervisors shall allow a reasonable compensation for the use thereof. [R., § 444; C., '51, § 222.]

[As amended by adding the last sentence.]

532. Powers of trustees.

The law invests township trustees with a discretion as to what is deleterious to public health and the power to cause its abatement: *Bushnell v. Whitlock*, 77–285.

534. Records.

Record of a direction or order of the trustees for the election of additional justices under § 1036 must be made by the trustees in order to be valid: *State v. Gaston*, 79–457.

556. Board of health.

Where certain land purchased for cemetery purposes was found to be unsuitable, and the township trustees proposed to sell the same on condition that it should never be used for cemetery purposes, *held*, that it was within their discretion as a board of health to impose the restriction as to the use of the land: *Bushnell v. Whitlock*, 77–285.

561. Expenses.

The township trustees and clerk are not entitled to bring action in their names for the recovery from the county of money due for expenses of the local board of health: *Sanderson v. Cerro Gordo County*, 80–89.

564. Sale of cemetery property.

Where land was purchased for cemetery purposes, but was found to be unsuitable, *held*, that the township trustees could not be enjoined from selling the land because they proposed to sell only on condition that the premises should never be used for cemetery purposes, and in case of a breach of the condition the purchasers should forfeit the land to the trustees: *Bushnell v. Whitlock*, 77–285.

CHAPTER 10.

CITIES AND TOWNS.

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ized into a city or incorporated town, they may apply by petition in writing, signed by not less than twenty-five of the qualified electors of the territory to be embraced in the proposed city or incorporated town, to the district court of either county, which petition shall describe the territory proposed to be embraced in such city or incorporated town, and shall have annexed thereto an accurate map or plat thereof and state the name proposed for such city or incorporated town, and shall be accompanied with satisfactory proofs of the number of its inhabitants within the territory embraced in said limits, and shall proceed in all respects as is provided by statute for the organization of cities and incorporated towns and be governed by the same law.

[The second section of this act, providing for the jurisdiction of mayors in such towns, is inserted *infra*, § 693*a*.]

576. Annexation of territory.

The provision for the annexation of territory by a proceeding in court is not unconstitutional: *Ford v. North Des Moines*, 80–626.

When a petition has been presented, signed by the requisite number of electors, the court has no discretion. The court has the authority to appoint the commissioners of election, and nothing more. The question of incorporation or annexation, as the case may be, is determined by the electors: *Ibid.*

These provisions for annexation are not unconstitutional for want of provision as to notice to property owners of the proceeding before the court: *Ibid.*

It is not required that the notice of election shall be made of record, and where it appears that notice was actually given and commissioners report that an election was held under due and legal notice, that is sufficient: *Ibid.*

Under particular facts *held* that annexation of territory to a city was proper, although separated by a river: *Ibid.*

Where the copies of the proceedings filed in the office of the county recorder and that of the secretary of state were not certified as correct copies, *held*, that such defect did not affect the validity of the annexation, and a subsequent correction of such defect after the bringing of action to question the validity of proceedings taken in pursuance of such annexation was sufficient: *Ibid.*

586. Taxation of annexed property.

The provisions of this section in regard to exemption from taxes apply to lands added to the city, and not to those already within its limits: *Perkins v. Burlington*, 77–553.

A tract of eighteen acres of land occupied as a homestead and situated within the city limits, which has never been platted, but which is surrounded on all sides by land laid out into lots, streets and alleys, and which is benefited by city improvements, such as lights, water, streets, railroads and fire stations, *held* subject to taxation for city purposes: *Ibid.*

586a. Extension of limits in certain cases. 23 G. A., ch. 1, § 1. The boundaries of all cities in this state, which had, by the state census of 1885, a population of thirty thousand or more, are hereby extended two and one half miles in each direction, from the present boundaries of said cities. Such extension being so made, as to leave the boundaries hereby created in a perfected rectangle; that all the territory embraced within said extended boundaries, whether the same is contained in cities, incorporated towns or otherwise, shall be and become a part of the city and subject to its jurisdiction and authority; and that the corporate character of any annexed territory within the extended boundaries herein specified, shall cease and determine; provided, that if any one of such outside boundary lines, as extended by this act, shall come within two miles of a county line, such boundary line on such side shall extend only one and one half miles beyond the present boundary line of such city; provided, further, that nothing herein contained shall affect the rights of existing creditors, or present boundaries or existing conditions of school districts.

[As to changing township boundaries in such case, see 23 G. A., ch. 25, *supra*, § 518*a*.]

586b. Former debts. 23 G. A., ch. 1, § 2. All present indebtedness of

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exclusively upon property subject to taxation within the city, as it existed prior to the passage hereof. That the indebtedness, if any, of each city or incorporated town, lying within the limits of the annexed territory shall be paid by such city or incorporated town; and the city council is hereby authorized and it is hereby made its duty to provide for the levy of taxes upon the property subject to taxation within the limits of such city or incorporated town, for the payment of the indebtedness of such city or incorporated town, and to continue such tax from year to year so long as the same shall be necessary for the payment of such indebtedness, and in no event shall property subject to taxation outside of the limits of such city or incorporated town be subjected to any tax for the payment of the present indebtedness thereof. *Provided*, however, that if any such cities or incorporated towns included within such annexed territory, now own any real estate, its present fair market value shall be credited upon its debt, and the amount of such credit shall be assumed and paid by the city as extended by the provisions of this act, and all property belonging to all incorporated cities or towns affected by this act, shall become the property of the city as enlarged hereby.

586c. Agricultural lands not taxed. 23 G. A., ch. 1, § 3. No lands included within said extended limits of such city, which shall not have been laid off into lots of ten acres or less, or which shall not subsequently be divided into parcels of ten acres or less, by the extension of streets and alleys or otherwise, and which shall also in good faith be occupied and used for agricultural or horticultural purposes, shall be taxable for any city purpose, except that they may be subjected to a road tax to the same extent as though they were outside the said extended limits, and which said road tax shall be paid into the city treasury.

586d. Wards. 23 G. A., ch. 1, § 4. For the purpose of reorganizing the wards of said cities, the boundaries of which are extended by this act, the governor shall appoint six persons in each of such cities, and residents thereof respectively, three from each of the two principal political parties; who are hereby constituted commissioners for the purpose of redistricting such cities respectively into wards. Said commissioners shall meet as a board, within six days from the taking effect of the act, having given at least three days' notice in one or more of the daily newspapers published in said city or cities, of the time and place of their meeting, and shall hear the arguments and suggestions of all who may desire to appear before them, as to the proper boundaries of the new wards, and after hearing such arguments, to such an extent as such commissioners may determine, they shall lay off the said city or cities, whose boundaries are hereby extended, into the same number of wards, as the city or cities may now have, with such boundaries as they shall prescribe; but said wards shall be laid off in a rectangular form as nearly as practicable, and making, so far as practicable, boundaries conform to the center of streets and with straight lines and so as to give each ward, as nearly as practicable, an equal population. Said commissioners shall file and have recorded, the original order defining the boundaries of said wards, with the clerk of the district court of the county wherein the city is situate, and a copy or duplicate thereof, with the clerk of the city council, which he shall record. They shall also within the ten days after the appointment, for the purpose of holding the first election, hereinafter provided for, divide said wards into voting precincts, and appoint registers in each voting precinct to prepare and revise the lists of voters, using so far as applicable present registration and poll lists from which to make said lists; and they shall for that purpose sit on each week day for one week previous to said election. And said commissioners shall also appoint judges of election, and designate polling places in each voting precinct.

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586e. Elections. 23 G. A., ch. 1, § 5. In all cities affected by this act the regular municipal election shall be held on the first Monday in April, in the year 1890, and in each alternate year thereafter. At such election there shall be elected all elective officers for such terms and in such manner as now provided by law for cities of the first class. Said officers shall qualify within the time and in the manner now provided by law, and the terms of office of all officers in office prior to said first election in all such cities or towns shall cease and determine upon the organization of the new city council so elected.

586f. 23 G. A., ch. 1, § 6. All acts and parts of acts inconsistent with this act are hereby repealed. *Provided* that nothing in this act shall be construed to affect pending litigation concerning the acts of the council of North Des Moines in regard to street pavement or any other litigation in existence at the time of the passage of this act.

613. Powers.

Cities and other municipal corporations can exercise only such authority as is expressly granted by their charters, or legislative acts creating them, or necessarily implied in such grant, or incident thereto; and reasonable doubts as to the existence of authority in such corporations are always to be resolved against it: *Brockman v. Creston*, 79–587.

Cities have power to dispose of their real property for purposes authorized by law, and for no other purpose: *Ibid.*

Therefore, where a city attempted to transfer to the county, for court-house purposes, property belonging to the city, and used as the city hall, *held*, that such transfer was without authority, and could be enjoined at the suit of a tax-payer: *Ibid.*

A non-resident tax-payer may maintain such action, and it is immaterial whether he is a tax-payer to a large amount or not: *Ibid.*

Municipal corporations have, and can only exercise, such powers as are expressly granted to them by law and such incidental ones as are necessary to make such powers available, and are essential to effectuate the purposes of the corporation, and those powers are strictly construed: *Becker v. Keokuk Water-works*, 79–419.

Therefore, *held*, that a city had no authority to insert in a contract with a water-works company a stipulation for indemnity to tax-payers for damages caused by failure of the company to furnish water in accordance with the terms of such contract: *Ibid.*

615. Nuisances; speed of trains; use of streets.

A municipal corporation is not authorized to bring an action in equity to enjoin and abate a nuisance on the ground that it is injurious to its citizens under § 4567, and the authority given by this section must be exercised through the medium of an ordinance, and not by equitable proceedings in court: *Ottumwa v. Chinn*, 75–405.

Under the authority of this section, a city cannot by ordinance provide for the imposition of fines against persons committing a nuisance. The power of the city is limited to the abatement of such nuisance: *Knoxville v. Chicago, B. & Q. R. Co.*, 50 N. W. R., 61.

In an action to recover damages against a railway company for negligently causing the death of a person on its track, the fact that the engine of defendant was being operated within city limits at a higher rate of speed than allowed by the ordinance may be shown without proof that the accident was directly due to the train being operated at excessive speed: *McMarshall v. Chicago, R. I. & P. R. Co.*, 80–757.

In a particular case, *held*, that the ordinance limiting the speed of trains within the city limits to ten miles an hour would not be deemed unreasonable with reference to a crossing three-fourths of a mile from the depot, it not appearing but that the crossing was one in general use, and a dangerous one, if a higher speed should be permitted: *Larkin v Burlington, C. R. & N. R. Co.*, 52 N. W. R., 480.

The council of a city or town may, under reasonable restrictions, authorize private parties to erect scales in a street whereby the public convenience will be served: *Spencer v. Andrew*, 82–14.

622. Regulations; peddlers.

While the passage of the prohibitory liquor law took away from the city the authority to regulate places for the sale of intoxicating liquors, yet under § 660 the city has power to enact an ordinance for the regulation of saloons of other kinds: *Clinton v. Grusendorf*, 80–117.

A peddler is a person who travels about the country with merchandise for the purpose of selling it; but a person employed by a resident mercantile establishment, to call on citizens with samples of goods and solicit their orders for the goods, is not a peddler, and is not subject to penalties under a city ordinance declaring such acts to be peddling: *Davenport v. Rice*, 75–74.

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623. Streets; establishment; railways.

After the passage of an ordinance by a town council establishing a street or avenue it will be presumed that it was established for public use as such, but the presumption may be overcome by proofs sufficient to show the facts otherwise; and where the real purpose was to furnish a right of way for a railroad, *held*, that it would not be considered an appropriation for "public purposes" within the meaning of the law as to the authority of the council in such cases: *Strahan v. Malvern*, 77–454.

Where a tract of land was laid out into lots with streets and a public square, but never opened to the public, and was subjected to taxation according to government subdivisions without regard to the dedication to public use, *held*, that the city was estopped from setting up any claim, under such dedication, to the streets and the square after adverse possession thereof for the statutory period: *Smith v. Osage*, 80–84.

In an action to recover for land sold to defendant town for the location of an avenue, where defendant claimed that the purchase of the land was the result of a fraudulent conspiracy between plaintiff and the council of the defendant town to indirectly secure a right of way for a railroad under a pretense of establishing an avenue, *held*, that the fact that the railroad company was endeavoring to obtain the right of way at the time was proper for consideration, and the record of condemnation proceedings, although the awards had not been paid, were competent to show that fact: *Strahan v. Malvern*, 77–454.

As to dedication of streets in cities, see notes to § 996.

The property owner cannot take advantage of the method of procedure pointed out by this section for the purpose of having his damages from the construction of a railway in the street determined, but can only resort to an action to recover judgment: *Harbach v. Des Moines & K. C. R. Co.*, 80–593.

After such an assessment has been made, if the damage is not paid the company may be enjoined from occupying the street on the ground that it is a trespasser and maintaining a nuisance: *Ibid.*

The fact that the land-owner has brought an action at law for damages and recovered judgment does not preclude him from having an injunction in a proper proceeding to restrain the use of the street by the company: *Ibid.*

The fact that the railway company is occupying the street as the successor of another company under purchase of its franchises at foreclosure sale does not relieve it from being enjoined at the suit of a property owner who recovered judgment against the former company, and the successor cannot plead that the former company occupied by the consent of the land-owner, that defense having been merged in the judgment against such former company: *Ibid.*

Under the provisions of § 1980 a railway company has the right to cross a street with its track without paying damages to abutting property owners, where it does not occupy the street in front of abutting property. But if it crosses the street at an angle, so that a portion of the track is in front of abutting property, the provisions of this section as to consent of council and as to damages apply: *Enos v. Chicago, St. P. & K. C. R. Co.*, 78–28; *Gates v. Chicago, St. P. & K. C. R. Co.*, 82–518.

In determining whether the street is occupied in front of abutting property, not only the track, strictly speaking, but also any embankment made for the purpose of constructing the track, is to be taken into account, and also any embankment in the street for the purpose of constructing the railroad crossing: *Gates v. Chicago, St. P. & K. C. R. Co.*, 82–518.

Embankments forming the road-bed and approaches to highways or street crossings, rendered necessary by the construction of a railroad, are a part of the railway track, within the meaning of this section, and an owner, in front of whose property such an approach is constructed in the street, is entitled to damages: *Nicks v. Chicago, St. P. & K. C. R. Co.*, 50 N. W. R., 222.

The compensation provided for in this section is not for property taken, but for damages to abutting property: *Ibid.*

Under this section the owner is entitled to recover for injury to the land as well as to his improvements: *Ibid.*

The rule of damage is the difference in the value of the property before and after the construction of the track, approaches, etc.: *Ibid.*

Where abutting lot-owners join in an agreement that a railway track may be laid down in the street, and it is laid down and operated in accordance with that agreement, any such lot-owner or his grantee is estopped from questioning the right of the railroad to maintain such track: *Merchants' Union Barb Wire Co. v. Chicago, R. I. & P. R. Co.*, 79–610.

The benefits to the property may be taken into account but will not entirely preclude recovery.: *Enos v. Chicago, St. P. & K. C. R. Co.*, 78–28.

In an action by a lot-owner for damages caused by a railway company constructing its road so that the rails were above the established grade, being so constructed on the theory that under the ordinances of the city the company was entitled to lay its tracks on the grade, *held*, that the company could not object that damages were assessed on the theory that such obstruction was permanent: *Eslich v. Mason City & Ft. D. R. Co.*, 75–443.

A witness may be asked whether the annual premium for insurance would be higher: *Ibid.*

One who is not the owner of the fee in the street can recover only on proof of actual damages; *Cook v. Chicago, M. & St. P. R. Co.*, 49 N. W. R., 92.

This section does not authorize the erection of an electric light plant: *Hanson v. Hunter Electric Light Co.*, 48 N. W. R., 1005.

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623a. Street railways. 23 G. A., ch. 11, § 1. All cities and incorporated towns, including cities acting under special charters, shall have the power to authorize or forbid the construction of street railways, within their limits, and may define the motive power by which the cars thereon shall be propelled, including animal, electricity, steam, or other power, whether now known or hereafter utilized.

623b. Acts legalized. 23 G. A., ch. 11, § 2. All ordinances or resolutions of such cities or incorporated towns heretofore enacted, granting to any person or company the right to propel its cars by electricity are hereby declared legal and valid. *Provided* that nothing in this act shall *effect* [affect] present or pending litigation or any vested rights.

624. Repairs; liability for injuries.

The question being whether the street commissioner had authority to make certain repairs, and use therein material for which the city should become liable, *held*, that there was an issue as to whether or not the city had authorized the repair in which the material was used, and it was for the jury to say whether the resolutions in regard to repairs related to those in question, or to those previously made: *Kemper v. Burlington*, 81–354.

In an action by the owner of rock which had rolled and fallen from his quarry upon the streets of a city, and which had been used by the city in making repairs on the streets, for the value of such material, *held*, that if the material was used upon the streets, not merely by way of abatement of the obstruction, but also for the betterment of the road, the city would be liable for the value of the material, less the cost of removal: *Ibid.*

In such case *held* that the jury were properly charged that the city had the right to the whole width of its streets, and was chargeable with the duty of keeping the same in good repair and reasonable condition, and had the right to remove any rock or material found upon any part of its streets and put there without its authority: *Ibid.*

Also *held* that plaintiff was not entitled to recover anything for rock or material which could be shown to have been abandoned by him: *Ibid.*

It is the duty of the city to maintain its sidewalks in a reasonably safe condition, and this duty extends not merely to the street and sidewalk, but to things under its control endangering the safety of those using them: *Blivens v. Sioux City*, 52 N. W. R., 246.

Damage from the falling of a bill-board which had been left in a defective and dangerous condition beside the sidewalk is an injury arising from the defect of the street or sidewalk, within the terms of § 633, requiring that action for such claims be brought within six months, unless notice be served upon the corporation within ninety days after the injury occurred: *Ibid.*

In an action for damages sustained by reason of injuries to a horse caused by an obstruction in the street, *held*, that it was proper to show that the origin and cause of the obstruction was the negligent construction of a culvert, that it might be determined whether defendant was negligent or not: *Hazard v. Council Bluffs*, 79–106.

In an action for injuries caused by a defective sidewalk where the evidence tended to show that all walks constructed at the time the walk in question was built were improperly constructed, *held*, that defendant was chargeable with notice of the defects in the walk, even though it had no actual notice of its condition and such condition could not have been discovered with ordinary care: *Weber v. Creston*, 75–16.

And the fact that the sidewalk causing the injury was built in the customary manner adopted by the city for building sidewalks, *held* to be no defense in an action for negligence causing injury: *Ibid.*

In an action to recover damages for injuries received from a defective sidewalk, it is improper to allow a witness who has no knowledge of the condition of the walk at the time of the accident to testify as to its condition afterwards: *Hoyt v. Des Moines*, 76–430.

In such case, *held*, also, that statements made by the sidewalk commissioner after the accident, when not acting officially or in the discharge of official duty, could not be shown for the purpose of proving knowledge on the part of the city of the defective condition: *Ibid.*

Evidence of a witness that he had fallen upon the same sidewalk from a defect therein, but was unable to state the exact place of the defect, *held* improperly admitted: *Ibid.*

The city is not liable for accidents not to be anticipated in the ordinary use of a bridge: *McClain v. Garden Grove*, 48 N. W. R., 1031.

Where a subsequent physical damage was shown which might have been the result of an injury arising from a defective sidewalk, but it did not appear that such damage resulted necessarily from such injury rather than from some other cause, *held*, that the damage could not be taken into account, and should not have been submitted to the jury as an element in determining the amount of recovery: *Trapnell v. Red Oak Junction*, 76–744.

Evidence is admissible in an action to recover for injuries from a defective sidewalk to show that complaints concerning the condition of the walk were made to the city council before the accident, the object of such evidence being to show that the city had notice of the defect: *Ibid.*

In an action for personal injuries due to defect in sidewalk, experts may be allowed to

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testify as to how long the kind of lumber used in the sidewalk will last: *McConnell v. Osage*, 80–293.

For the purpose of showing that the city should have known of the condition of the walk where the injury occurred, the injured party may be allowed to prove the defective condition continuously along an entire block (following *Armstrong v. Ackley*, 71–76; distinguishing *Ruggles v. Nevada*, 63–185): *Ibid.*

In an action to recover damages suffered by having stepped into an opening adjoining the sidewalk in the street, evidence that other parties had previously fallen into the same opening and that the adjoining property owner was aware of that fact is, under the previous rulings of this court, inadmissible for the purpose of holding such property owner liable: *Mathews v. Cedar Rapids*, 80–459.

Where evidence showed that a barricade around an excavation in a sidewalk was in existence in the evening less than an hour before an accident occurred, and that at the time the accident occurred a portion of the barricade had been removed, *held* that, it not appearing that such removal was due to any act of the city, notice to the city of the defect in the barricade could not be inferred: *Theissen v. Belle Plaine*, 81–118.

In an action for injuries received by reason of a defect in the sidewalk, evidence as to the general bad condition of the walk about the place of the accident is admissible to show that the city is chargeable with notice of the defect: *Munger v. Waterloo*, 49 N. W. R., 1028.

Where it appeared that the planks of a sidewalk were loose and decayed before the accident, and the walk was not in good order, and that the attention of the members of the council had been called to it, *held*, that the evidence was sufficient to sustain a recovery by plaintiff for such accident: *Riley v. Iowa Falls*, 50 N. W. R., 33.

Evidence that the whole sidewalk is in a dilapidated condition is admissible for the purpose of showing that the proper officers of the city must have had knowledge of its condition, and of the particular defect complained of: *Smith v. Des Moines*, 51 N. W. R., 77.

While the office of sidewalk commissioner is not known to the law, it is competent for the city to employ a person to have charge of repairs of sidewalks and general supervision over them, and notice to such person must be held to be notice to the city: *Ibid.*

Evidence of a witness that he saw another person fall at the place in question at a previous time, *held* admissible to show that the walk was out of repair at that place: *Ibid.*

Where a sidewalk is laid on the side of a public street it will be presumed in the absence of evidence upon the subject that the city was chargeable with its defective condition: *Ibid.*

In an action to recover damages caused by a defective sidewalk where there was a conflict of evidence as to the condition of the sidewalk and as to whether defendant had constructive notice of its condition, *held*, that both questions were for the determination of the jury, and a judgment, based upon their finding, would not be disturbed upon appeal: *Troxel v. Vinton*, 77–90.

In such case knowledge on the part of the injured party of the condition of the sidewalk will not necessarily constitute contributory negligence: *Ibid.*

A person walking on a public street must, to avoid accident, act as a reasonably careful and prudent man would act considering all the circumstances surrounding him; but it is error to charge that as matter of law he should avoid all obstacles dangerous in their character which are plainly visible and not obscured: *Mathews v. Cedar Rapids*, 80–459.

Therefore, *held*, that where a passer on the sidewalk, attracted by a display in a shop window, stepped towards the window and fell into an area way left unprotected at the edge of the sidewalk, he was not, as matter of law, precluded from recovery by the fact that he might have noticed and avoided the opening if he had looked where he was stepping: *Ibid.*

Where it appeared that plaintiff, without any reason for doing so, went out of his way into an alley where there was no sidewalk, it being dark, and fell into an unprotected stairway, *held*, that he could not recover from the city. Alleys are not generally intended for foot passage, especially at night: *Ely v. Des Moines*, 52 N. W. R., 475.

In an action for the recovery of damages for injuries due to a defective street, it is incumbent upon the plaintiff to prove freedom from contributory negligence, and therefore, under an issue raised by general denial in such case, it is proper for defendant to prove the fact of plaintiff's intoxication, as showing contributory negligence: *Fernbach v. Waterloo*, 76–598.

In such a case, it is competent for the defendant to prove an ordinance prohibiting immoderate driving, and that defendant was violating such ordinance at the time of receiving his injuries; therefore, the introduction of the ordinance in evidence is not erroneous, even though the fact of immoderate driving has not yet been established: *Ibid.*

In an action for damages caused by a defective street, where it appeared that plaintiff went upon the street knowing the place to be dangerous, *held*, that this was not evidence *per se* that he contributed to the jury, but that the fact of contributory negligence was a question for the jury: *Byerly v. Anamosa*, 79–204.

630. Special tax for improvements.

When it is sought to charge a property owner for the cost of works of public improvement from which he acquires but little benefit except such as is shared by the public generally, the power must be exercised strictly in the manner prescribed by law: *Coggeshall v. Des Moines*, 78–235.

A special assessment for street improvements is regarded as a tax, and subject to the same rules, in many respects, as ordinary taxation for revenue; and where an assessment had been held invalid by reason of non-compliance with the law with reference to the contract, and in pursuance of a subsequent statute legalizing the proceedings, re-assessment was made and notice given to the prop-

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erty owner, *held*, that the re-assessment was valid: *Tuttle v. Polk*, 50 N. W. R., 38.

Under the provisions of a special charter, *held*, that the city might maintain an action at law to recover a special tax assessed on abutting property for the expenses of paving the street: *Muscatine v. Chicago, R. I. & P. R. Co.*, 79–645.

The fact that the statute authorizing incorporated towns to pave does not prescribe notice to property owners does not prevent sufficient notice being provided for by ordinance, by which owners of property have an opportunity to be heard in reference to the amount assessed against their land and lots: *Ford v. North Des Moines*, 80–626.

Where the amount of the assessment can be ascertained by a mere mathematical calculation, and where no judgment or discretion is required to be exercised, no notice of the assessment is necessary: *Ibid.*

The fact that the council is induced to order the paving of the streets at the expense of property owners by the proposition of parties interested that the grading shall be done without expense to the city does not render such arrangement for paving invalid: *Ibid.*

633. Claims for injuries.

This section will not be considered as applicable to claims already accrued, and which under its provisions could not be presented within the time required: *Kennedy v. Des Moines*, 50 N. W. R., 880.

Where a passer was injured by the falling of a bill-board which had been allowed to remain beside the sidewalk for a considerable time in a defective and dangerous condition, *held*, that the claim against the city for damages was within the terms of this section, and there could be no recovery in the absence of the written notice here required: *Blivens v. Sioux City*, 52 N. W. R., 246.

635. Change of grade.

A grade cannot be established except by an ordinance, and the act of the city in otherwise adopting or establishing a grade, to the damage of a property owner, will render the city liable: *Trustees v. Anamosa*, 76–538.

In determining the damages by reason of change of grade, the rule is to consider the difference in the value of the property as it was just before the change and as it was just after, so far as such difference is due to the change. In such cases resulting benefits may be taken into account: *Stewart v. Council Bluffs*, 50 N. W. R., 219.

Evidence as to the reasonable cost of putting the property in the same condition that it was before the change is admissible and proper to be considered; but the ultimate fact is the difference in the value caused by the change, and not the expense of putting the property into the same condition: *Ibid.*

636. Public property; condemnation.

A city has no authority to convey lands or other property for uses not contemplated by law; therefore, *held*, that a city could not transfer to the county its city hall for courthouse purposes: *Brockman v. Creston*, 79–587.

These provisions, although by § 650 made applicable to cities under special charter, are not exclusive of the provisions found in the charters of such cities for the same object: *Arnold v. Council Bluffs*, 52 N. W. R., 847.

The exercise of the powers conferred by these sections with reference to city parks is exclusively in the city council, without the vote of the electors, except where, under the provisions of § 653, park commissioners have been provided for: *In re Cedar Rapids*, 51 N. W. R., 1142.

The right to purchase or condemn lands for use as a park is here conferred without restriction as to the ability of the city or town to pay therefor. The land-owner is not concerned in such ability to pay, as he is not required to give credit, and as payment in full must be made, either upon purchase or condemnation. It cannot be said that the city by proceeding to acquire land for park purposes incurs an indebtedness. Therefore, proceedings cannot be held invalid, because the city is indebted to the constitutional limit: *Ibid.*

639. Water-works; electric light plant.

A water-works company may make a contract with a private party to extend its mains to his premises, and locate hydrants there, for a compensation to be paid by him, in addition to the amount allowed by the city for hydrants: *Muscatine Water-works Co. v. Muscatine Lumber Co.*, 52 N. W. R., 108.

It is not necessary that the vote of the electors precede the passage of an ordinance for the establishment of water-works. While it is the approving vote that authorizes their erection, yet the council may provide beforehand as to the conditions on which the vote is asked. *Taylor v. McFadden*, 50 N. W. R., 1070.

Under the statutory provisions as to water-works, the council may submit the proposition for the sinking of an artesian well and for voting a tax for that purpose: *Ibid.*

By a "majority of the voters of a city or town" is meant the majority of the voters casting their votes at the election: *Ibid.*

As to electric light plants, see *Hanson v. Hunter Electric Light Co.*, 48 N. W. R., 1005; *Thompson-Houston Electric Light Co. v. Newton*, 42 Fed. R., 723.

641. Taxation of water-works; contracts.

Where water-works were erected upon premises outside of the city, leased for use as long as needed for the purpose, *held*, that the entire plant, together with the mains, pipes, etc., was assessable as real property in the township in which the main works were lo-

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cated: *Oskaloosa Water Co. v. Board of Equalization*, 51 N. W. R., 18.

A city has no authority to insert in a contract between it and a water-works company a stipulation that the company shall be liable to property owners for damages due to a failure of the supply of water, causing a loss to property by fire: *Becker v. Keokuk Waterworks*, 79–419.

645a. Other provisions for bonds. 22 G. A., ch. 10, § 1; 23 G. A., ch. 13. In all cases when a city of the second class or an incorporated town has determined or hereafter may determine to erect water-works to be owned and operated by the city or town as provided for in section four hundred and seventy-one of the code [§ 639], it shall be lawful for such city or town to issue its bonds to procure the money for such purpose to an amount not exceeding five per cent. upon the taxable property of such city or town as shown by the last regular assessment thereof prior to the issuance of such bonds; but in no case shall the aggregate indebtedness of the city or town be increased by the issuance of such bonds beyond the limit of indebtedness fixed by the constitution of the state; and no money procured upon the issue of such bonds shall be used for any other purpose than the erection of such water-works. No such bond shall bear a greater rate than six per cent. interest, nor shall be drawn to run more than twenty years.

648. Indebtedness for parks.

As the acquiring of property for park purposes as here provided does not necessarily involve an indebtedness, the validity of the proceeding cannot be questioned on the ground that the city is already indebted to its constitutional limit: *In re Cedar Rapids*, 51 N. W. R., 1142.

649. Special assessment; notice.

Where notice of a special assessment on city property to pay for street improvements is necessary to be given to the respective owners, and the city has provided by ordinance for giving such notice by publication in a newspaper of general circulation published in the city, notice given in accordance with the provisions of such ordinance is sufficient, and personal notice is not required: *Lyman v. Plummer*, 75–353.

650. Special assessment; collection fee.

This section is not repealed so far as the collection fee is concerned by the provisions of § 876: *Tuttle v. Polk*, 50 N. W. R., 38.

Notwithstanding the provisions of preceding sections are thus made applicable to cities under special charters, corresponding provisions in such charters are not thereby repealed: See notes to § 636.

653. Parks.

[As to boards of park commissioners, see 24 G. A., chs. 1 and 2, *infra*, §§ 902*a et seq.*]

In cities or towns having park commissioners, the power to condemn lands for park purposes belongs to them exclusively, but when there are no park commissioners such power is to be exercised by the corporation through its council: *In re Cedar Rapids*, 51 N. W. R., 1142.

655. Taxes for parks.

The provisions of this act do not repeal §§ 636 and 647, and the council may exercise the power conferred by these sections where park commissioners have not been provided for: *In re Cedar Rapids*, 51 N. W. R., 1142.

660. Ordinances.

Under this section the council may pass ordinances for the regulation of saloons other than those for the sale of intoxicating liquors: *Clinton v. Grusendorf*, 80–117.

See, also, *Hanson v. Hunter Electric Light Co.*, 48 N. W. R., 1005.

669. Adoption of.

Where it appeared that a resolution was offered at a council meeting, and was entered of record by order of the council as adopted by it, *held*, that its adoption would be inferred, although the record failed to show that it was adopted: *Taylor v. McFadden*, 50 N. W. R., 1070.

Where it appeared that by three-fourths vote the rules were suspended, so as to authorize the second and third readings on the same day, *held*, that such showing brought the case within the provisions of this section, "suspend" being equivalent to "dispense:" *Bayard v. Baker*, 76–220.

Where a new ordinance does not attempt to amend the old by adding to or taking from one of its sections, but contains in full the section as it was designed to be when amended, that is a sufficient compliance with the statute: *Larkin v. Burlington, C. R. & N. R. Co.*, 52 N. W. R., 480.

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671. Compensation of officers.

A city officer cannot enter into a contract with the council binding himself to perform certain duties for less compensation than was allowed him by an ordinance of the city when he entered upon his office: *Purdy v. Independence*, 75–356.

672. Record and publication of ordinances.

Where it appeared that an ordinance of the town of Bayard was published in the "Bayard News," etc., *held*, that this was sufficient evidence of the publication, although the paper was not shown to be a newspaper of general circulation in the corporation, it being presumed that the town officers performed the duties with which they were charged with reference to such publication: *Bayard v. Baker*, 76–220.

A certificate of the town recorder to an ordinance introduced in evidence, that it was "a true copy of ordinance . . . as passed by the town council, at the meeting of . . .," *held* sufficient to raise the presumption that the ordinance was properly recorded, and that the copy to which it was attached was a true copy of the paper duly recorded: *Ibid.*

Where it was claimed in an action for injuries at a railroad crossing within city limits that the defendant's train was being operated at a rate of speed prohibited by the city ordinance, *held*, that the ordinance was sufficiently proved by showing that it was passed and recorded, without evidence of its publication. In such case, it is not necessary for the adverse party to show that any such publication was made, that provision being applicable only to suits for fines, penalty or forfeiture under the ordinance: *Larkin v. Burlington, C. R. & N. R. Co.*, 52 N. W. R., 480.

673. Yeas and nays.

The corporate authority in towns being vested in the mayor, recorder and six trustees, the record of the passage of an ordinance disclosing that five trustees and the mayor voted in favor of it, *held* sufficient to show its passage, although it did not appear that the nays were called, the record not disclosing that any other members of the council were present than those voting yea: *Bayard v. Baker*, 76–220.

675. Certifying taxes; redemption.

Omission to certify a tax until after the date here fixed will not render the tax invalid, if it is certified in time to be placed upon the tax list: *Taylor v. McFadden*, 50 N. W. R., 1070.

Where a city had authority under its charter to sell property for taxes, *held*, that it might enter into a compromise with the taxpayer for the redemption of his property, and that such compromise would be binding: *Hintrager v. Richter*, 52 N. W. R., 188.

692. Jurisdiction of mayor.

There being no express statutory provision for compensation of the mayor where he exercises the authority of justice of the peace in criminal cases in which there is no conviction, such compensation cannot be recovered by him: *Howland v. Wright County*, 82–164.

693. Jurisdiction of mayor, when exclusive.

It is plainly provided by this act that a mayor of a city of the second class shall have exclusive jurisdiction for violation of a city ordinance, and an action in the district court for such violation cannot be maintained: *Lansing v. Chicago, M. & St. P. R. Co.*, 52 N. W. R., 195.

693a. In county-line towns. 24 G. A., ch. 6, § 2. The mayors of cities of the second class or incorporated towns, when the same are composed of portions of two counties, shall have exclusive jurisdiction of violation of its ordinances, *provided* that, if the mayor is unable to hold court, or in case of his absence from such city or town, the action may be brought before any justice of the peace having an office in the city or town: *provided*, that the action shall be brought before a justice having an office in that county where the violation of such ordinance occur.

[The first section of this act provides for the organization of such cities or towns. See *supra*, § 573a.]

693b. Compensation when acting as justice of the peace. 24 G. A., ch. 7, § 1. Whenever the mayor of any city of the second class or any incorporated town of this state is called upon to act, or acts, and performs the duties of a justice of the peace he shall be entitled to and receive the same compensation as now allowed by law to justices of the peace for similar services and to be paid in the same manner.

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707a. Funding indebtedness by towns. 24 G. A., ch. 14, § 1. Incorporated towns having an outstanding indebtedness evidenced by town warrants, of not less than one thousand dollars, at the time of the passage of this act are hereby authorized, by a vote of two-thirds of the town council, to fund such indebtedness, and to issue coupon bonds of such corporation in sums not less than one hundred dollars nor more than one thousand dollars, having not more than twenty years to run, redeemable in lawful money of the United States at the pleasure of such corporation, after five years from the date of their issue, and bearing interest payable semi-annually at a rate not exceeding six per cent. per annum. And such incorporated towns may also, in the same manner, refund the indebtedness of said corporation evidenced by bonds thereof *heretofore* issued and outstanding at the time of the passage of this act.

707b. Bonds. 24 G. A., ch. 14, § 2. Said bonds shall be substantially in the following form:

No. ——. The incorporated town of ——, in the state of Iowa, for value received, promises to pay —— —— or —— order, on the first day of ——, or at any time before that date after the expiration of five —— years at the pleasure of the said —— ——, the sum of —— dollars, with interest at the rate of —— per cent. per annum, payable semi-annually, at ——, on the —— day of ——, and —— in each year upon presentation and surrender of the interest coupons hereto attached.

This bond is issued by the council of said incorporated town, under the provisions of chapter ——, of the acts of the Twenty-fourth General Assembly of the state of Iowa, and in conformity with a resolution of said incorporated town council, dated —— day of ——, 18—.

In testimony whereof the said town council of the incorporated town of —— have caused this bond to be signed by its mayor and attested by its recorder with the seal of said incorporated town, affixed, this —— day of ——, 18—.

—— ——, Recorder,

—— ——, Mayor of the incorporated town of ——.

And the interest coupons attached to said bonds shall be substantially in the following form:

No. ——. The treasurer of the incorporated town of ——, in the state of Iowa, will pay the holder hereof on the —— day of ——, 18—, at ——, the sum of —— dollars, for the interest on bond No. —— of incorporated town of ——, series of ——, issued under the provisions of chapter ——, acts of the Twenty-fourth General Assembly of the state of Iowa.

—— ——, Recorder.

707c. Issuance. 24 G. A., ch. 14, § 3. Whenever any bonds issued under the provisions of this chapter shall be duly executed, numbered consecutively and sealed, they shall be delivered to the treasurer of said incorporated town issuing the same, and his receipt taken therefor, and he shall stand charged on his official bond with all bonds so delivered to him and the proceeds thereof, and he shall sell them on the best available terms or exchange them for any legal indebtedness of said incorporated town evidenced by the outstanding warrants or bonds of said incorporated town outstanding at the date of the final passage of this act, but in no case shall said bonds be sold or exchanged for a less sum than their face value and all interest accrued at the date of said sale or exchange; and if such bonds shall be sold for money, the proceeds thereof shall be applied exclusively to the payment of said bonds or indebtedness outstanding at the date of the final passage of this act. When they are exchanged for warrants of said incorporated town said treasurer shall at once cancel said warrants. He shall keep a record of all bonds sold or exchanged by him, by number, date of sale, amount, date of maturity, the name and ad-

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dress of the purchaser, and if exchanged, what evidences of debt were received therefor, which record shall at all times be open to the inspection of the citizens of said incorporated town; said treasurer shall also report under oath to the council of said incorporated town, at each first regular session thereof in each month, a statement of all such bonds so sold or exchanged by him since his last report and the date of such sale or exchange, when exchanged, a description of the indebtedness of said incorporated town for which said bonds were exchanged.

707d. Limit. 24 G. A., ch. 14, § 4. No bonds shall be issued under this act in excess of the constitutional limit nor for any other purpose than to fund the outstanding indebtedness of said incorporated towns evidenced by the warrants of said incorporated towns outstanding at the date of the final passage of this act, or to refund outstanding bonds, at such time or by contracts existing at such date and to be performed within the year 1892.

707e. Payment of interest. 24 G. A., ch. 14, § 5. The council of any incorporated town issuing bonds under and by virtue of this chapter shall cause to be assessed and levied each year upon all the taxable property of said incorporated town, in addition to the levy for other purposes, a sum sufficient to pay the interest on bonds outstanding issued in conformity with and by virtue of the provisions of this act accruing before the next annual levy, and such proportion of the principal, that at the end of eight years the sum raised shall equal at least fifteen per cent. of the amount of the bonds issued; at the end of ten years at least thirty per cent. of said amount; and at or before the date of maturity of said bonds a sum equal to the whole amount of the principal and interest past due and to become due prior to the next levy, and the same shall be collected and used for the payment of the bonds issued under and by virtue of the provisions of this act, and the interest thereon and for no other purpose.

707f. Principal. 24 G. A., ch. 14, § 6. Whenever an amount in the hands of the treasurer belonging to the bond fund, after deducting the amount required to pay the interest on said bonds maturing before the next levy, shall be sufficient to redeem one or more bonds, he shall notify the owner of such bond or bonds that he is prepared to pay the same with all interest accrued thereon, and if not presented for payment or redemption within thirty days after the date of such notice, the interest on such bonds shall cease and the amount due thereon shall be set aside for the payment thereof when presented. All redemptions shall be made in the exact order of their issuance, and the notice herein required shall be directed to the address of the owner of said bonds as shown by the record kept in the treasurer's office.

707g. Failure to levy tax. 24 G. A., ch. 14, § 7. If the council of any incorporated town which has issued bonds under the provisions of this act, shall fail to make the levy necessary to pay such bonds and interest coupons at maturity and the same shall have been presented to the treasurer of said incorporated town, and payment thereof refused, the owner may file the bond together with all unpaid coupons with the auditor of state, taking his receipt therefor, and the same shall be registered in the auditor's office, and the executive council at their next session as a board of equalization and at each annual equalization thereafter shall add to the state tax to be levied in said incorporated town a sufficient rate to realize the amount of principal and interest, and the money arising from such levy shall be known as the bond fund, and shall be considered as part of the state tax and paid into the state treasury and placed to the credit of said incorporated town, as bond tax, and shall be paid by warrants as the payments mature to the holder of such bonds as shown by the register of the state auditor, until the same shall be fully satisfied and discharged, provided, that nothing herein contained shall be construed to limit

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or postpone the right of any holder of any such bonds to resort to any other remedy which said holder might otherwise have.

707h. Diversion. 24 G. A., ch. 14, § 8. Any member of the council or any officer of any incorporated town levying and collecting taxes under the provisions of this act who shall in any manner participate in, or advise the diversion of said tax to any other purpose than that provided for in this act, shall be deemed guilty of the crime of embezzlement and shall be punished accordingly.

722. Powers of council.

The council of a city or town has power to authorize the erection in a public street of a scale by an abutting property owner, which does not interfere with the use of the street for public travel: *Spencer v. Andrew*, 82-14.

725. Additional powers. 22 G. A., ch. 16, § 1; 23 G. A., chs. 2 and 7. All cities of the first class and cities of the second class having over seven thousand inhabitants and cities organized under special charters in this state in addition to the powers now granted, shall have the further and additional powers conferred by this act, as follows, to wit: they shall have power to establish, build and regulate market houses, slaughter houses; to license and regulate bill posters; to repair temporary sidewalks without notice to the property owner and provide by ordinance for the manner of assessing the expense thereof on the property in front of which such repairs are made; to remove snow or ice from the sidewalk without notice to the property owner and provide by ordinance for the manner of assessing the expense thereof on the property in front of which such snow or ice shall be removed; *provided*, however, that the expense thereof shall not exceed one and one-half cent per front foot of any lot; *provided*, that the snow or ice has remained upon the walk for the period of fifteen hours; *provided* that the provisions hereof, relating to the removal of snow and ice from sidewalks, shall extend to and include all cities of the second class; to repair paving, curbing, sewers and catch-basins; to regulate telegraph, telephone, electric light, district telegraph and other electric wires, and provide the manner in which, and places where the same shall be placed upon, along or under the streets and alleys of such city; to regulate the price of gas, electric light, water rates and to regulate and fix the charges for water meters, gas meters, electric light meters, or any other device or means necessary for determining the consumption of gas, water or electric light. This shall not be construed to authorize the passage of an ordinance or resolution on the making of any contract, whereby the above powers are abridged. To fix the charges for making gas, electric light, steam heating, water, telephone and district telegraph connections; to compel street railway companies, whenever any street is ordered paved to pave and maintain in width three and one-half feet each way commencing at the center of the space between the rails, and in case of failure to do so to provide by ordinance for such paving and maintenance, and for the manner of assessing against such companies the cost thereof; to compel railroad companies to erect, construct, maintain and operate under such regulations as may from time to time be provided by the council, suitable gates upon public streets at railroad crossings; to provide that magazines used for the keeping of gunpowder, inflammable oils and other combustibles, shall not be located or maintained within a certain distance of the corporate limits of such cities; to provide that before any association, company, society, order, exhibition or aggregation of persons shall parade or march upon the streets of such cities, that they shall first obtain from the mayor of such city a permit, when issued to be without charge, and the same shall state the time, manner and conditions of such parade or march; to provide by ordinance that the width of all streets and alleys, of all additions to such cities, shall be graded in the same

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manner, and that they shall conform to the width of the existing streets and alleys of such cities; to expel and remove from office, by a vote of three-fourths of the members of the city council any elective officer of such city charged with any crime under the statutes of this state, and such removal shall be as provided by section five hundred and thirty of the code, title four, chapter ten [§ 729], for the removal of the members of the city council, to make its bonds for all purposes now provided by law or hereafter to be provided by law, payable on or before a date named, or payable at a time certain, as the city council may determine. And such cities shall have full control of the bridge fund levied and paid upon the property within their corporate limits, and shall have the right to use the same for the construction of bridges and culverts and approaches thereto, repairing the same and paying bridge bonds and interest thereon, issued by such city; and it is hereby made the duty of the board of supervisors of the counties within which such cities are located to levy annually upon all of the taxable property within such city such a per centum for that purpose as may be directed by the city council of such cities not exceeding the limit fixed by law: *provided* that no contract heretofore made respecting the application of the bridge tax shall be affected hereby: and *provided* further that so much of this chapter as refers to the bridge fund, shall not apply to first class cities organized under the general incorporation laws of this state during the years between 1887 and 1890; nor to second class cities having a population of less than ten thousand by the census of 1885, nor to cities acting under special charters and having a population of less than four thousand by the census of 1885.

[As amended so as to make the provisions as to removal of snow and ice extend to cities of the second class, and by the addition of the proviso at the end.]

726. Control over streets.

As to liability for failure to keep streets and sidewalks in repair, see notes to § 624.

744. Pledging tax for paving.

The city is not limited under this section to pledging the probable revenues for a particular year, but so long as it keeps within the constitutional limit of indebtedness, it may pledge the taxes for future years: *Coggeshall v. Des Moines*, 78-235.

750a. Paving, curbing and sewer contracts. 23 G. A., ch. 14, § 1; 24 G. A., ch. 12. All cities in this state containing according to any legally authorized census or enumeration, a population of over four thousand, and all cities in this state organized and existing under special charter, shall have all the powers and be subject to the provisions of this act.

[By the latter of the acts referred to, these provisions, which first related only to cities under special charter, are extended as here indicated.]

750b. Contracts for material. 23 G. A., ch. 14, § 2. When the council of any such city shall direct the paving and curbing of any street or streets, or the construction of any sewers, such council or the board of public works in case such board shall exist, shall make and enter into contracts for furnishing materials, and for the curbing paving surface with any composition patented or otherwise or sewering as the case may be, either for the entire work in one contract or parts thereof in separate and specified sections as to them may seem best.

750c. Bids. 23 G. A., ch. 14, § 3. All such contracts shall be made by the council or the board of public works when such board shall exist, in the name of the city, and shall be made with the lowest bidder or bidders upon sealed proposals after public notice for not less than ten days in at least two newspapers of said city, which notice shall state as nearly as practicable the extent of the work, the kind of materials to be furnished, when the work shall be done, and at what time the proposals shall be acted upon.

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750d. Bond of contractor. 23 G. A., ch. 14, § 4. Each contractor shall be required to give bond to the city with sureties to be approved by the council, or by the board of public works where such board shall exist, for the faithful performance of the contract, and the council of such board shall have power to institute suit in the name of the city to enforce all such contracts.

750e. Engineer. 23 G. A., ch. 14, § 5. It shall be the duty of the city engineer to furnish the council or board of public works in case such board shall exist, with proper grades and lines, and see that the work is done in accordance with the ordinances and regulations of the city, with respect to said grades and lines.

750f. Bonds. 23 G. A., ch. 14, § 6. For the purpose of providing for the payment of the cost and expenses of any such improvement or improvements, the council or board of public works in case such board shall exist, shall be authorized from time to time as the work progresses, to make requisitions upon the mayor of the city, for the issue of bonds of the city in such sums as shall be deemed best, and it shall be the duty of the mayor to make and execute bonds accordingly in the name of the city, to an amount not exceeding the amount of the contract price of any such improvement and the incidentals attending the same. Said bonds shall bear the name of the place or places improved, and shall be signed by the mayor and countersigned by the city clerk, or city recorder as the case may be and sealed with the corporation seal of the city, and shall all bear the same date and be payable seven years after date, and be redeemable at any time at the option of the city and shall bear interest at the rate of not exceeding six per cent. per annum, payable semi-annually.

750g. Issuance. 23 G. A., ch. 14, § 7. When such bonds shall have been issued by the mayor and sealed with the corporation seal of the city, they shall be delivered to the city clerk or city recorder as the case may be, who shall register them in a book to be kept for that purpose and countersigned and then delivered to the committee or person authorized to negotiate the same, taking receipt therefor.

750h. Sale. 23 G. A., ch. 14, § 8. Said committee or person authorized to negotiate said bonds, shall negotiate the same in such manner as they, or he may deem best and for such prices as may be obtainable for the same not less the par, and shall pay all moneys received therefrom to the treasurer of the city, and report to the city clerk or city recorder as the case may be the number of bonds sold, and the amount received therefor, and before delivering the same to the purchaser said bonds shall be countersigned by the person or committee authorized to negotiate the same.

750i. Fund. 23 G. A., ch. 14, § 9. All moneys received by the city treasurer from the sale of said bonds shall be kept by him in a separate fund, and paid out on requisition of the council accompanied by affidavit of the city engineer, that work has been done or material furnished to the amount of said requisition, and that it is required for the payment of the same, and all moneys received by said treasurer shall be kept in the same manner and subject to all the regulations regarding other money of the city, except he shall keep a separate account of same and all interest received upon the same shall be credited to such fund.

750j. Assessment of costs. 23 G. A., ch. 14, § 10. When any such improvement shall have been completed, it shall be the duty of the council to ascertain the entire cost of the improvement and also what portion of such cost, may be by law assessable on adjacent property and the portion of such cost so assessable, shall then be assessed as provided by law, or by ordinance of such city upon the property fronting, or abutting on said improvement. Whenever any street railway may have been constructed and shall remain

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upon any street which the council may direct to be paved, at the time when such direction shall be given; and when the owner of such street railway may be bound to pave any portion of said street by any action of the city under section 1 of chapter 16 of the acts of the Twenty-second General Assembly, or by virtue of the provisions or conditions of any ordinance of the city under which said street railway may have been constructed, or may be maintained, and if the owner shall fail or refuse to comply with the order of the council to do such paving, then the portion of the cost of paving such street, assessable upon such street railway, shall be ascertained, and shall be assessed against such street railway.

750k. Plat; objections; assessment. 23 G. A., ch. 14, § 11; 24 G. A., ch. 9, § 1. The council shall cause a plat to be made and filed with the city clerk or city recorder as the case may be for public inspection of the place or places on which such improvement shall be made showing the separate lots or parcels of ground, subject to assessment for such improvement, and the names as far as practicable of the several owners, and the amount to be assessed against each lot or piece of ground, and if such improvement shall be the paving of any street, said plat shall also show any and all street railway tracks thereon, and the amount, if any, to be assessed against such street railway, and shall after the making and filing of said plat as aforesaid, cause to be given ten days' public notice in two daily newspapers, published in such city that such plat is on file in the office, of the city clerk, or city recorder as the case may be for the inspection of any person or company interested therein, and that any such person or company having any objection to the same or the tax proposed to be assessed thereby, shall file with the said city clerk, or city recorder as the case may be his or their objections in writing, at or before the next meeting of such council, after the publication of such notice, that such council at such meeting, or as soon thereafter as practicable and after hearing and deciding upon any objection so filed, if any, and after making all necessary corrections in the assessment as proposed by said plat, shall assess and levy as a special tax upon the property of each owner, liable to special assessments as aforesaid, its just and true proportion according to law, and according to said assessment proposed by said plat as corrected and approved of the amount to be specially assessed for any such improvement. Said assessment shall be duly entered on the proper tax books of such city, and shall be payable at the office of the city collector of said city, or other officer authorized to collect city taxes in seven equal instalments with interest at the rate of six per cent. per annum, from date of the assessment upon the unpaid portion thereof, the first of which with interest on the whole amount at six per cent. per annum shall be payable on and after the date of such assessment, as aforesaid, and the others annually, after the date of such assessment and said assessment shall be collected like other special taxes, as may be provided by the ordinance of such city: *Provided*, that when the whole or any part of the cost of constructing any sewer, shall be required by ordinance of any city to be paid by the proceeds of a sewage tax, to be levied upon all the property of such sewer district, according to valuation, that said city shall have the power to levy the entire cost of such sewer, required to be paid by such sewer district, at once, upon all the property within such district, and determine by ordinance or resolution the whole percentage of tax, necessary to pay such cost, and the percentage to be paid in any one year, and when the same shall become delinquent and such taxes shall be entered, and payable and collectible as other special taxes in this chapter provided for; and said city shall have the right to issue bonds in anticipation of the payment of such taxes, in the same manner, and with the same effect as herein provided for bonds issued for taxes levied upon specified abutting property.

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750l. Lien. 23 G. A., ch. 14, § 12; 24 G. A., ch. 9, § 2. Said assessment with interest accruing thereon, shall be a lien upon the property abutting upon the street or streets on which any said improvement is made, or upon such improvement, or the entire property upon which such tax is levied, from the commencement of the work, and shall remain a lien until fully paid, and shall have precedence over all other liens except ordinary taxes, and shall not be divested by any judicial sale, provided that such lien shall be limited to the lots or lands bounding or abutting on such street or streets, or on such improvement and not exceeding in depth therefrom one hundred and fifty feet. Any assessment against any street railway for the paving of any street shall be at first and paramount lien upon the entire track of said street railway in the limits of the city making such assessments.

750m. Payment. 23 G. A., ch. 14, § 13. The owner of any property against which an assessment shall have been made for the cost of any such improvement, shall have the right to pay the same in full, with interest thereon at six per cent. per annum, from the time said assessment was made, or after having paid one or more of said seven instalments, and interest, he may at any time pay in full the balance of his assessments remaining unpaid, with interest thereon at six per cent. per annum, from the time when the preceding payment becomes due, and such payment in full shall satisfy and discharge the lien upon said property, and any owner of such property who shall divide the same so that the feet front on any such improvement are divided into separate lots or parcels may discharge the lien in like manner upon any one, or more of such lots or parcels by payment of the amount unpaid thereon calculated, by the ratio of feet front of such lot or lots or parcel or parcels to the feet front of the whole lot. If any assessment shall have been made against any street railway for the paving of any street, the owner of said street railway shall have the same rights as are hereinbefore provided to pay in instalments, or to pay in full, the assessment against said street railway; but no part of the line of said street railway shall be released from the lien for any portion of any unpaid assessment which may have been made against it for paving any street as aforesaid.

750n. Payment of interest and principal. 23 G. A., ch. 14, § 14. All moneys received from assessments shall be appropriated to the payment of the interest or payment and redemption of the bonds, or of the certificates hereinafter provided for as the case may be, that shall be issued for such improvements, and if any interest shall become due on any of said bonds, when there is no fund to pay the same, the council shall be authorized to make a temporary loan for the payment thereof.

750o. Certificates. 23 G. A., ch. 14, § 15. If by reason of the prohibition contained in section 3, article 11, of the constitution of this state, it shall at any time be unlawful for any such city to issue bonds as by this act provided, or for any other reason or reasons at the discretion of the council it shall be lawful for such city to provide by ordinance for the issuance of certificates to contractors, who under contract with the city, shall have constructed any such improvement in payment therefor, each of which certificates shall state the amount or amounts of one or more of the assessments, made against an owner or owners, and lot or lots, or street railway, on account of and for payment of the cost of any such improvement, and shall transfer to the contractor and his assigns all of the right and interest of such city to, in and with respect to every such assessment, and shall authorize such contractor and his assigns, to receive, sue for, collect or have collected every such assessment, embraced in any such certificate by, or through any of the methods provided by law, for the collection of assessments for local improvements including the provision of this act.

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750p. Waiver of objections. 23 G. A., ch. 14, § 16. Whenever the owner or owners of any lot or lots, or any street railway, the assessment or assessments against which is or are embraced in any such certificate, shall severally promise and agree in writing indorsed on such certificate, that in consideration of having the right to pay his or their assessment or respective assessments in instalments, they will not make any objection of illegality or irregularity as to their respective assessments, and will pay the same with interest thereon, at such rate not exceeding six per cent. per annum, as shall by ordinance or resolution of the city council of such city be prescribed and required, he or they shall have the benefit and be subject to all the provisions of this act authorizing the payment of assessments in annual instalments, relating to the lien and collection and payment of assessments so far as applicable.

750q. Payment. 23 G. A., ch. 14, § 17. Any owner of any lot or lots, of any street railway assessed for payment of cost of any such improvement, who will not promise and agree in writing as provided by section 16, hereof shall be required to pay his assessment in full when made, and the same shall be collectible by or through any of the methods provided by law for the collection of assessments for local improvements including the provisions of this act.

750r. Mistakes. 23 G. A., ch. 14, § 18. Any mistake in the description of the property, or in the name of the owner shall not vitiate the lien.

750s. Petition by owners. 23 G. A., ch. 14, § 19. The council of any such city shall not have the right to authorize any improvement under this act, unless the owners of a majority of the feet front of the property abutting upon the street or streets to be improved, or any such improvement shall petition therefor, or unless the same shall be voted for by three-fourths of the members of the council.

750t. Parts of street. 23 G. A., ch. 14, § 20. Any part of any street may be improved under this act, as well as an entire street.

750u. 23 G. A., ch. 14, § 21. All acts and parts of acts in conflict with this act, are hereby repealed provided nothing herein contained, shall be construed as prohibiting or preventing such cities, from making special assessments to pay for the construction of sewers upon adjacent property, according to area, or from paying for such construction by any method of assessment, or any combination of methods now provided by law.

755. Funding indebtedness by cities. 21 G. A., ch. 78, § 1; 22 G. A., ch. 17, § 1; 23 G. A., ch. 12; 24 G. A., ch. 15, § 1. All cities organized under the general incorporation laws of the state and having a population of five thousand or more according to the last state or national census, and whose outstanding indebtedness, evidenced by the warrants of said cities, exceeds the sum of ten thousand dollars, and all cities having a population of less than five thousand, according to the last preceding census as aforesaid, and whose outstanding indebtedness, evidenced by the warrants of said cities amounts to the sum of five thousand dollars are hereby authorized and empowered to fund the same, and issue bonds of said cities therefor. Said bonds shall be in sums of not less than one hundred dollars and not more than one thousand dollars each, having not more than twenty years to run, and bearing a rate of interest of not more than six per cent., payable semi-annually. And such cities may also in the same manner refund the indebtedness of said corporations evidenced by bonds thereof heretofore issued and outstanding at the time of the passage of this act.

[By the last act amending this section it is provided that the other sections of 22 G. A., ch. 17, shall apply to all bonds issued under the provisions of this act. As to funding indebtedness of cities of the first class, see 23 G. A., ch. 4, *infra*, § 823a.]

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769. Superior courts; jurisdiction.

As the district court of Pottawattamie county (as the successor of the circuit court) holds terms at Avoca at which it has jurisdiction over that portion of the county east of a certain line, the superior court of Council Bluffs has no jurisdiction except over that portion of the county which is within the jurisdiction of the district court when it is sitting at Council Bluffs, and therefore that portion which is west of said line. This decision, however, does not relate to chapter 40 of the acts of 22 G. A., which took effect after this case was tried in the lower court: *Whitaker v. Daly*, 78–81.

786a. How superior courts abolished. 24 G. A., ch. 5, § 1. Upon the petition of one-third of the qualified electors of any city or town of less than eight thousand inhabitants by the census of 1890, in which a superior court is now established, the mayor by and with the consent of the common council of such city or town, shall at least ten days before an election for city officers issue a proclamation submitting to the qualified voters of said city or town, the question of abolishing the superior court. The ballots shall either be printed or written and in the following form: "For abolishing superior court," or "Against abolishing superior court."

786b. Transfer of jurisdiction. 24 G. A., ch. 5, § 2. If a majority of votes cast at said election are for abolishing said superior court, the mayor of such city or town shall immediately transmit a certificate showing such fact to the secretary of state, and said court shall be abolished to take effect upon the date of the expiration of the term of office of the judge then upon the bench of said court, and the effect of such abolishment shall be to revive and re-establish in such city or town the police court and all the powers incident thereto, in the same manner as the law prescribed for cities and towns where superior courts do not exist.

The judge of said superior court shall before retiring from said position turn over to the clerk of said city or town the judgment records of his court in which is entered and recorded all judgments and fines for the violations of ordinances of such city or town together with all money collected as fines for the violation of ordinances, and take the clerk's receipt therefor. All other books, records and papers pertaining to said superior court shall be turned over to the clerk of the district court of the county in which such city or town is situated and his duplicate receipt taken therefor, together with all money in the hands of said judge which has come into his hands as judge of said superior court, and one receipt be filed with the county auditor, and said judge shall immediately make reports to the board of supervisors and city council as to the disposition made of said books, papers, dockets, and moneys as herein provided. It shall be the duty of the clerk of the district court upon receipt of such books, dockets and records belonging to said superior court to transfer all cases pending before said superior court as shown by said record and of which the district court would have jurisdiction to the proper appearance docket of the district court, and to notify the parties or their attorneys of such transfer, and said cause will come on for hearing at the next term of the district court after such transfer without further notice. All causes pending in the superior court at the time of its abolishment of which the district court would not have jurisdiction, shall be transferred to the police court. The clerk of the district court shall make transcript and issue executions from the records of said superior court under the seal of the district court, for which he shall be entitled to charge and receive the same fees as are now allowed for like service in the district court, and all papers so issued shall have the same force and effect as if issued from the superior court during its existence.

793. Water-works bonds. 22 G. A., ch. 10, § 1; 23 G. A., ch. 13. In all cases when a city of the second class, or an incorporated town, has determined, or hereafter may determine, to erect water-works, to be owned and operated by the city or town, as provided for in section four hundred and seventy-one

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of the code [§ 639], it shall be lawful for such city or town to issue its bonds to procure the money for such purpose to an amount not exceeding five per cent. upon the taxable property of such city or town, as shown by the last regular assessment thereof prior to the issuance of such bonds; but in no case shall the aggregate indebtedness of such city or town be increased by the issuance of such bonds, beyond the limit of indebtedness fixed by the constitution of the state; and no money procured upon the issue of such bonds shall be used for any other purpose than the erection of such water-works. No such bond shall bear greater rate than six per cent. interest, nor shall be drawn to run more than twenty years.

[As amended so that the provisions are applicable to towns as well as cities.]

793a. Sewers. 24 G. A., ch. 11, § 1. All cities of the second class in the state be subject to the powers and provisions of chapter 162 laws of the Seventeenth General Assembly, chapter 25 of the laws of the Twentieth General Assembly, chapter 7 laws of the Twenty-second General Assembly. [§§ 838–846, 857, 858.]

793b. Permanent system. 24 G. A., ch. 11, § 2. The powers and provisions of these acts shall apply to all cities of the second class when a permanent sewerage system has been begun, or may hereafter be begun.

793c. 24 G. A., ch. 11, § 3. All acts or parts of acts inconsistent with this act are hereby repealed.

793d. Tax for fire departments. 23 G. A., ch. 8, § 1. Any city of the second class may levy a tax of not more than one mill on the dollar, in addition to the maximum tax now authorized by law, for the purpose of maintaining a fire department, and the money so raised shall constitute a fire fund and shall be applied to no other purpose.

793e. Disbursement. 23 G. A., ch. 8, § 2. The city council shall provide by ordinance, the manner in which disbursements shall be made for the purchase of fire apparatus and services rendered by members of the fire department while engaged at any fire said bills to be audited and paid in the same manner as other bills, by the city council.

[For various other provisions now made applicable to cities of the second class, see *infra*, §§ 725, 824, 838.]

798a. Assessment districts. 23 G. A., ch. 3, § 1. The city council of all cities of the first class which had by the state census of 1885 a population of thirty thousand or more, shall have the power at any time to divide such cities, irrespective of township lines, into as many assessment districts as shall be necessary to insure the performance of the work of assessment within the time required by law, and one assessor shall be elected by the electors of the entire city for each of the assessment districts so fixed by the city council at the regular municipal election hereafter to be held in such cities, as now provided by law.

798b. Vacancies filled. 23 G. A., ch. 3, § 2. The city council in such cities shall also have the power to fill vacancies that may occur, or that may now exist in the office of assessor in any assessment district now or hereafter created; and if any of the said districts as now or hereafter fixed by the city council shall be found to be without an assessor, the city council may appoint an assessor for such district, or districts, having the qualifications now provided by law, which appointee, after having qualified, shall perform all of the duties of such assessor until his successor is elected and qualified under existing laws.

801. Marshal's fees.

This provision does not make the county liable for the fees of the marshal in state cases, and there is no statute which does impose such liability: *Guanella v. Pottawattamie County*, 50 N. W. R., 217.

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823a. Funding bonds. 23 G. A., ch. 4, § 1. Cities of the first class organized as such under the general incorporation laws since January 1st A. D. 1885 shall have power and authority to issue, as may be ordered by the city council, bonds for the purpose of funding or refunding any subsisting legal indebtedness of said corporations outstanding at the date of the final passage of this act.

823b. Terms. 23 G. A., ch. 4, § 2. All bonds issued under and by virtue of this act, shall draw a rate of interest not exceeding six per centum per annum, payable annually or semi-annually, and shall be issued in denominations of not more than one thousand dollars each; and having not more than thirty years to run, with principal and interest payable at such place as the city council shall by resolution in ordering the issue of said bonds, direct and provide.

823c. Resolution as to purpose. 23 G. A., ch. 4, § 3. All bonds issued under the provisions of this act, shall be issued pursuant to and in conformity with a resolution adopted by the city council, which said resolution shall specify the purpose for which said bonds are to be issued, the rate of interest they shall bear, and whether payable annually or semi-annually, the place where said principal and interest shall be payable, and when said bonds shall become due and payable, and such other provisions in reference to said bonds as to said city council shall seem expedient and proper, and not inconsistent with the provisions of this act; which resolution shall constitute a contract between the said city and the purchasers or holders of said bonds, and said resolution shall be entered of record upon the minutes of the proceedings of the city council, and printed upon the back of the bonds to be issued.

823d. Sale. 23 G. A., ch. 4, § 4. All bonds issued under the provisions of this act shall be sold to the highest bidder for cash, under the direction of the city council, and said bonds shall not be sold for less than their face value and accrued interest, and the proceeds of the sale of such bonds shall be applied and exclusively used for the purposes for which said bonds are issued.

823e. Registration. 23 G. A., ch. 4, § 5. Said bonds shall be signed by the mayor and attested by the auditor or clerk, as the case may be, with the seal of the city affixed, and numbered consecutively; and the interest coupons attached thereto shall be signed by the auditor or clerk, as the case may be, and when said bonds have been so executed as aforesaid, they shall be delivered to the treasurer, who shall register the same in a book provided for that purpose, which register shall show the number of said bonds, their date, date of sale, amount, date of maturity, and the name and address of the purchaser; and the treasurer shall thereupon certify upon the back of said bonds as follows:—"This bond duly and properly registered in my office this —— day of ——, —— —— City Treasurer," and the treasurer shall after such registration, deliver said bonds to the purchaser thereof, as shall be directed and ordered by the city council.

823f. Levy to pay interest. 23 G. A., ch. 4, § 6. The city council of all cities issuing bonds under and by virtue of the provisions of this act, shall cause to be levied each year upon all the taxable property of said city, in addition to the levy for other purposes a sum sufficient to pay the interest on bonds outstanding, issued under the provisions of this act, to accrue before the next annual levy.

823g. Levy to pay principal. 23 G. A., ch. 4, § 7. The city council of all cities issuing bonds under and by virtue of the provisions of this act, shall cause to be levied upon the taxable property of said city in addition to the levy for all other purposes as provided by law, a tax for the purpose of creating a fund for the payment of said bonds; which said levy shall be made at such time and in such manner that the fund to be derived therefrom shall be

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available and sufficient to pay said bonds at their maturity; and in accordance with the terms and provisions of the resolution of the city council under which said bonds are issued.

823h. Payment by state auditor. 23 G. A., ch. 4, § 8. If the city council of any city which shall issue bonds under the provisions of this act, shall fail to make the levy necessary to pay the interest on said bonds, or for the payment of said bonds at maturity, in compliance with the resolution under which said bonds are issued, and any of said bonds or the interest coupons shall have been presented for payment and payment thereof refused, the owner of said bonds may in addition to any other remedies he may have in law or equity, if he so elects, file the same together with all unpaid coupons with the auditor of state, taking his receipt thereof, and the same shall be fully registered in the auditor's office; and the executive council at their next session as a board of equalization, at the time of the levy of the state tax, and at each annual session thereafter, shall declare a levy upon the taxable property of said city, of a sufficient rate to realize the amount then due or to become due on said bonds, prior to the next levy, which shall be collected the same as the state tax and paid into the state treasurer, and placed to the credit of such city for the payment of said bonds and interest, and shall be paid to the persons entitled thereto upon the warrants drawn by the state auditor, as shown by the bonds registered in his office, and when so paid the bonds and interest coupons shall be canceled by the state auditor and returned by him to the treasurer of the city issuing the same, who shall receipt to him therefor.

824. Assessments for street improvements. 20 G. A., ch. 20, § 1; 23 G. A., ch. 9. Cities of the first class, that have been or may be so organized since January first, 1881, and cities of the second class having a population of more than ten thousand inhabitants according to the census of 1885, shall have power to open, widen, extend, grade, construct permanent sidewalks, curb, pave, gravel, macadamize and gutter, or cause the same to be done in any manner they may by ordinance deem proper, any street, highway, avenue or alley within the limits of such city, and may open, extend, widen, grade, park, pave or otherwise as aforesaid, improve part of any such street, highway, avenue or alley, and levy a special tax as hereinafter provided on the lots and lands fronting and abutting on such street, highway, avenue or alley, and where said improvements are proposed to be made to pay the expenses of the same. But unless the owners, resident in such city, of a majority of the front feet owned by them, of the property subject to assessment as hereinafter provided, for such improvements, shall petition the council of such city to make the same, such improvements shall not be made until three-fourths of all the members of such council shall by vote, assent to the making of the same; *provided*, that the construction of permanent sidewalks, curbing, paving, graveling or macadamizing of any such street, highway, avenue or alley, shall not be done until after the bed of the same shall have been brought so near to the grade as established by the ordinances of such city, as that said sidewalks, curbs, paving or other improvements as aforesaid, when fully completed, will bring said streets, highways, avenues or alleys fully up to said established grade.

[As amended so as to apply to certain cities of the second class.]

829. Paving tracks. 20 G. A., ch. 20, § 6; 23 G. A., ch. 9. All railway companies and street railway companies in cities of the first and second class as provided in section one of this act [§ 824], shall be required to pave, or repave between rails and one foot outside of their rails, at their own expense and cost. Whenever any street, highway, avenue or alley shall be ordered paved or repaved by the council of any such city, such paving or repaving between and outside of the rails, shall be done at the same time and shall be of

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the same material and character as the paving or repaving of the street, highway, avenue or alley upon which said railway track is located, or of such other material as said council may order, and when said paving or repaving is done said companies shall lay in the best approved manner the strap or flat rail. Such railway companies shall keep that portion of the streets, highways, avenues or alleys between and one foot outside of their rails, up to grade and in good repair, using for such purpose the same material with which the street, highway, avenue or alley is paved upon which the track is laid, or such other material as said council may order. In the event of the neglect or refusal of such railway companies to pave, or repave, or repair as aforesaid, when so ordered and directed as aforesaid by the council of such city, such city shall have power to pave, repave or repair between and outside of said rails as herein required of such railway companies, and the cost and expenses of the same to assess and levy as a special tax upon any of the real estate or personal property of such railway company, within the corporate limits of said city, which tax shall be a lien upon said property, shall become delinquent in sixty days after it is levied, shall draw interest at the rate of seven per cent. per annum, and said city shall have power to enforce the payment of the same in the same manner and by the same means and with and under the same penalties as is provided herein with reference to special taxes upon the abutting property on the streets, highways, avenues or alleys, ordered to be improved as aforesaid, as hereinbefore provided.

[As amended so as to apply to cities of the second class.]

The provision requiring paving of portions of the street outside of the tracks is not unconstitutional as applied to street railways incorporated when the statute only required pavement within its tracks. Such a change is within the power of the legislature with reference to the regulation of corporate franchises: *Sioux City St. R. Co. v. Sioux City*, 78–367; affirmed, 138 U. S., 98.

The provisions of this section are not invalid as applicable to a street-car company whose franchise was granted before the law took effect: *Sioux City St. R. Co. v. Sioux City*, 78–742.

832a. Levy for street grading fund. 23 G. A., ch. 5, § 1. All cities of the first class incorporated under the general incorporation laws of the state of Iowa, whose population according to the census of 1875 was not less than nineteen thousand, are hereby authorized to levy in addition to the taxes which they are now empowered to levy, a special tax not exceeding three mills on the dollar on the assessed valuation of all the property in said city for the purpose of creating a fund for the grading of streets, and known as the grading fund.

832b. No other purpose. 23 G. A., ch. 5, § 2. The money raised by the tax hereby authorized to be levied shall not be used for any other purpose than that hereby contemplated.

832c. Borrowing. 23 G. A., ch. 5, § 3. It shall be competent for any city authorized by this act to levy such tax, to anticipate the collection thereof by borrowing money and pledging such tax for a period of not more than five years, and no tax shall be pledged until the expiration of said period whether levied or not, for the payment of the money so borrowed.

834. Re-assessment of special taxes.

This act is sufficient to authorize a council to ratify their previous proceedings under a contract which has been held invalid by reason of not determining the kind and quantity of material to be used, before advertising for bids, by re-assessing the cost of the paving, and re-issuing certificates therefor: *Tuttle v. Polk*, 50 N. W. R., 38.

838. Sewers; assessment; levying tax. 17 G. A., ch. 162, § 1; 21 G. A., ch. 34; 23 G. A., ch. 10. All cities of the first class and cities of the second class having a population of three thousand and upwards according to the last state or national census in the state may provide by ordinance for the construction of sewers, or may divide the city into sewerage districts in such man-

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ner as the council may determine, and pay the cost of constructing same out of the general revenue of the city, or assess the cost upon the adjacent property, or may levy a certain sewerage tax within the sewerage district, out of which to pay for the construction of the same, which sewerage tax shall not exceed in any one year, two mills on the dollar of the assessed value of the property within such district, or may pay a part of the cost of such construction out of the general revenue, a part by the assessment of adjacent property, and a part by levying a tax upon all the property within the sewerage district, or may pay for the same by pursuing any two of the methods herein named.

[As amended to apply to cities of the second class. These provisions are also extended to cities of the second class by 24 G. A., ch. 11, *supra*, §§ 793*a*-793*c*.]

858a. Changing water courses. 23 G. A., ch. 6, § 1. Any city of the first class, of the state of Iowa, organized as such under the general corporation laws since the 1st day of January, A. D. 1885, shall have power to deepen, widen, straighten, wall-up, fill-up, cover, alter or change the channel of any water course, or any part thereof, flowing through the corporate limits of said city. Also to build and construct artificial channels, covered drains or sewers sufficient to carry the water theretofore flowing in any such water course, and to divert any such water course from its natural bed, channel or course, and to conduct the same into or through any such artificial channel, covered drain or sewer so constructed, and to fill up the channel of any such water course, the waters of which have been so diverted and changed.

858b. Plans. 23 G. A., ch. 6, § 2. When any such city shall desire to avail itself of the powers hereinbefore granted, and the city council shall determine by resolution or otherwise to exercise any of such powers, they shall direct the city engineer to make the proper plans and specifications for the doing of such work and to prepare an estimate of the cost thereof.

858c. Special election; conditions. 23 G. A., ch. 6, § 3. If said council on further examination and consideration of said plans and specifications, and of the expenses necessary to be incurred therein, shall still deem it advisable that any such work be done as proposed and contemplated, they shall call a special election in said city to determine whether said work shall be done, and also the question of raising or levying a special tax in addition to all other taxes now provided for by law for the purpose of paying the expenses thereof. *Provided* if the city council shall determine that the estimated cost of said work is greater than should be levied or collected in a single year, they may determine what proportion of the same shall be levied and collected each year and during what years the same shall be levied and collected. And the city council shall provide by ordinance or resolution the manner in which the voting of said special tax shall be submitted to the electors of said city.

858d. Plat. 23 G. A., ch. 6, § 4. If at such election, the majority of the votes cast shall be in favor of doing said work and in favor of levying of said special tax the city council shall order the city engineer to make a survey of said stream or any portion thereof, so proposed to be widened, deepened, straightened, walled up, filled up, altered, changed or diverted, as the case may be; said plat or survey to show the condition, position, location, boundaries and course of said stream at the time of platting of said town site, as near as possible, and also its present condition, location, and course, and any changes that have occurred in the natural course of the stream since the platting of said town site, and said plat shall also show all the lots or tracts of land by their platted or legal description abutting on said original or present channels; also the names of all owners of said lots and lands so abutting on said stream, and the city engineer shall file said plat in the office of the city clerk and shall keep and retain a duplicate thereof in his office.

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858e. Action; notice; appeal. 23 G. A., ch. 6, § 5. After said survey is made and filed, the city council shall appoint five commissioners, who shall be resident freeholders of said city, and not interested in any property abutting on said stream, so intended to be widened, changed, altered, walled up, filled up, straightened or diverted, who shall be sworn to faithfully and impartially perform the duties herein, or that may be required of them either by this act or any ordinance passed in pursuance hereof. The said commissioners so appointed shall have authority to proceed and determine what lot or lots, or lands abutting on said stream will be benefited or damaged, if any, by the doing of said work, and the amount of such benefit or damages, if any, as the case may be, which will accrue to or be sustained by each and every such lot or lots or parts of lots, or parcels of lands and the owners thereof, shall make report, in writing, of their findings and determination. In determining any question as to whether any benefits accrue to, or damages are sustained by such lot or lots or parcels of land, or owners thereof the said commissioners shall consider the amount of land reclaimed or lost, and the expense that will be incurred to the owners of said property, in the doing of said work, and the advantages, if any, accruing from the removal of the easement of said water-course, and any other matter that said commissioners may deem proper to be considered in determining said question. *Provided*, that no damages shall be awarded for the cost of the filling of said channel. Said commissioners shall give notice of the time and place of their meetings to determine what lot or lots and lands are so benefited or damaged, as the case may be, by publication thereof, at least five days successively, prior thereto, in some newspaper in general circulation in said city, and for the purpose of enabling them to determine, the same, may take evidence and listen to and receive any statement which any owner of property may see fit to make in reference thereto. After said commissioners shall so make their finding and determination to the city council, the said city council may approve, reject or modify the same. *Provided*, that notice of the hearing before the said city council of said report of said commissioners shall be given by publication in a newspaper of general circulation in said city for five successive days, which last publication shall be ten days before such hearing. And if after said council shall hear said matter, they shall conclude to reject said report, they shall resubmit the matter of the determination of said benefits and damages to new commissioners, who shall proceed in the same manner as said original commissioners. If said city council shall approve or modify said finding of said commissioners they shall assess the amount of said benefits so found and determined against said abutting lot or lots or lands, and the said channel so to be filled up or reclaimed. Any person aggrieved by the action of the city council in making said assessments, shall have the right of appeal to the district court of the county in which said city is located, provided said appeal is taken within twenty days from said assessment, and shall also have the right to review said action of the city council in said district court, in the manner now provided by law.

858f. Channel filled; assessment. 23 G. A., ch. 6, § 6. If such stream or any part thereof is proposed to be diverted from its course, and conducted through another or different channel, or through any covered drain or sewer, the city council shall have power to order said stream or any part thereof, thus abandoned, as a water-course, to be filled up and if the same or any part thereof is not filled up by the owner or owners of said stream within such time as the city may by ordinance or resolution provide, the city council may proceed to let the work of filling said stream or any part thereof by contract, and the city council shall have power to assess the cost of filling up the remainder of the channel of said stream against said property abutting on said stream including that reclaimed therefrom, and against the owners thereof, in

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proportion to the number of cubic yards of fill required and made upon, against and in front of each of said lots or tracts, and the city council shall provide by ordinance or resolution, the manner of ascertainment of said cost and adopting and making said assessments the notice to be given to said owners of the time and place of making the same. And said city may provide by ordinance when said special assessments for benefits and for the expense of filling said old channel shall become due and payable, and whether in one payment or in instalments and the rate of interest not exceeding six per cent. per annum, said deferred payments shall draw, and may provide for the issue of improvement bonds, to be a lien on said property, and payable from the funds to be derived from said special assessments, all as provided in chapter 20, of the laws of the Twentieth General Assembly of Iowa, and acts amendatory thereof.

858g. Collection. 23 G. A., ch. 6, § 7. Such special assessments shall not be levied by the city council until said work shall be completed, they shall become delinquent at such time after the levy thereof as the city council may provide, shall constitute a lien against the lots and lands against which they may be assessed from the date of the resolution making the assessment, shall draw interest at a rate not exceeding six per cent. per annum, and may be enforced against said lots and lands and the owners thereof in any manner provided by law or the ordinances of said city. The assessments when delinquent may be certified to the county auditor and by him placed on the tax books of the county wherein said city is situated, and the same shall be collected and paid over in the manner provided by law for the collection of state and county taxes, and said city is hereby authorized to become a purchaser at any sale made by the county treasurer for any such delinquent special assessments, and shall be entitled, if the same shall remain unpaid as by law provided, to receive a treasurer's tax deed for said property so sold and thereafter may sell and convey the same in any manner they may deem best and proper.

858h. Streets and alleys. 23 G. A., ch. 6, § 8. All streets and alleys intersecting said old channel or stream opposite each other, shall be considered as projected from each side thereof and meeting in the center of said stream in such a manner as to make a continuous street or alley across the same, and if such street or alley is shown upon the present recorded plats as terminating on one side of said stream, the same shall be projected to the center thereof, and the expenses of filling all such streets and alleys shall be borne and paid by the city.

858i. Title. 23 G. A., ch. 6, § 9. If the title to the natural bed and banks of any stream or any portion thereof, after the same shall be diverted from its natural course and conducted through another channel or through any covered drain or sewer is in the public, or is in the corporation for the use of the public, then the said city shall have power to fill up the said channel so owned by the public, and pay the expenses thereof, and shall have power to sell and dispose of the same in any manner the city council may deem proper.

858j. Condemning private property. 23 G. A., ch. 6, § 10. Said cities are also hereby authorized to condemn and appropriate so much private property as shall be necessary to carry into effect any and all of the provisions granted or conferred by this act. When it shall be necessary for any such city to enter upon and condemn private property for any of the purposes herein enumerated, the proceedings to condemn the same and the compensation to be paid therefor shall be determined in the manner provided by sections 476 and 477 of chapter 10, of title 4 of the code of 1873 [§§ 447, 648].

858k. Work authorized. 23 G. A., ch. 6, § 11. After the report of the commissioners provided in section five hereof to the city council and the final action thereon by the city council as hereinbefore provided, the city council

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shall have authority to order said work of constructing said new drain, sewer or channel, or part thereof, to be done as provided and to levy said special taxes to pay the costs and expenses thereof. They shall have power to authorize different portions of said work to be done in different years successively, and in such case, shall levy only such portion of said special tax each year as that portion of said work ordered done in any one year bears to the whole of said work proposed to be done.

858l. Payment of costs. 23 G. A., ch. 6, § 12. The cost and expense of doing any of the work authorized by this act (except the cost of filling any old channel, to be assessed against abutting property hereinbefore provided), the compensation to be paid for private property condemned and appropriated therefor, and the damages which any person may sustain by reason thereof, or by reason of the change of said old channel as hereinbefore provided, shall be paid out of special tax hereby authorized to be levied; the levy and collection of special assessments for benefits upon lots and the lands abutting upon said old water-course, as hereinbefore specified, and the special assessments, if any, which the city may make against any property adjacent to the street or alley on which said new sewer may be located and also from the proceeds of any sales as herein provided of said portion of said water-course from which the water shall have been diverted and the title to which may be vested in the public, or in the corporation for the benefit of the public, and also by appropriations from the general funds of said city available for said purpose.,

858m. Sewer assessment. 23 G. A., ch. 6, § 13. In case the new sewer as herein authorized, shall be constructed along any street or alley and shall be allowed by the city to be used as a sanitary or storm water sewer along the line thereof, then and in that case the city council shall have power to assess to the lots or lands adjacent to the line of such sewer, a portion of the cost of such sewer, not exceeding, however, in any event, the sum of two dollars per lineal foot of sewer, and if such assessment is made, the same shall be assessed and levied against adjacent property in the same manner as is now or hereafter may be provided by law, and the ordinances of any such city in which such sewer is to be constructed for the construction of sewers and the assessments of the costs thereof.

858n. Borrowing. 23 G. A., ch. 6, § 14. Said cities shall have authority in anticipation of the collection of said tax, to borrow money for the purpose of doing said work, and may issue its bonds therefor and shall have authority to provide by ordinance the manner of issuing the same, provided that the sums so borrowed by said city shall not exceed in any one year the total amount of said special tax actually levied at the time when any such loan shall be made.

861. Paving contracts.

These provisions imply a determination of the council, in advance of the publication of notice, of the kind of material to be used in the proposed work. Without such determination the requirement with reference to notice could not be complied with. Therefore, *held*, that where the proposition and notice were for bids for various forms of pavement, the question as to the kind to be adopted to be settled in the acceptance of the bids, the contract was not valid, and the abutting owners could not be required to pay certificates issued against their property: *Coggeshall v. Des Moines*, 78–235.

The fact that the property owner makes no objection until after a portion of the work has been done and expenses incident thereto incurred does not constitute an estoppel so as to prevent such property owner from contesting the validity of the assessment: *Ibid.*

874. Paving certificates.

Where the first assessment for improvements was void, and, by virtue of a legalizing act, a subsequent assessment for the same improvements was made, *held*, that the warrants for the improvements would not draw interest until the time of the second assessment: *Tuttle v. Polk*, 50 N. W. R., 38.

Also *held*, that the costs of suit on the warrants up to the time of the second assessme were properly taxed to plaintiff: *Ibid.*

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876. Collection of paving assessments.

The provisions of this section do not repeal those of § 650, with reference to a collection fee: *Tuttle v. Polk*, 50 N. W. R., 88.

881. Board of public works. 22 G. A., ch. 1, § 1; 24 G. A., ch. 3. There may be established and created in every city of the first class, having a population according to any legally authorized census of more than thirty thousand inhabitants, a board of public works, which shall consist of two members, residents of such city, to be appointed by the mayor, by and with the approval of the city council. One member shall be appointed for the term of two years, and the other for the term of three years, and they shall hold their office until their successors are duly appointed and qualified, and their successors shall be appointed in the manner hereinbefore provided for the term of three years. The mayor shall fill all vacancies occurring in said board by and with the approval of the city council but no member of the city council or city officer shall be appointed a member of said board.

[As amended by making the establishment of such boards discretionary and striking out the limitation as to time of appointment.]

902a. Park commissioners. 24 G. A., ch. 1, § 1; 24 G. A., ch. 2. There shall be elected by the qualified voters of each city of the first class, organized under the general incorporation laws of this state, and containing, according to any legally authorized census or enumeration, a population of thirty-five thousand, at the time of the city election in 1892, or if for any reason there shall be failure to elect at any regular election then at a special election called by the city council for that purpose, three park commissioners; whose terms of office shall be six years, except that the commissioners first elected, shall by lot determine who shall serve two and four years respectively, and thereafter, there shall at each city election in even numbered years, be elected one commissioner, who shall hold office for the full term of six years. In case of a vacancy in said office the city council may elect a commissioner to fill said vacancy, until the time for the election of a commissioner when the vacancy shall be filled by election. The mayor of each of said cities, shall at least ten days before each election for park commissioners, make proclamation thereof; and the names of the candidates for park commissioners, may be placed on the tickets with candidates for city officers, and the votes cast for commissioners shall be canvassed and returned, and certificates of election issued, by the same officers who shall canvass votes for members of the city council.

[As amended by inserting the provision for a special election.]

902b. Qualification; treasurer; bond. 24 G. A., ch. 1, § 2. Said commissioners shall within ten days after the receipt of their certificates of election, qualify by taking the oath of office, and shall organize as a board by the election of one of their number as chairman, and one as secretary. They shall also elect a treasurer, who shall not be a commissioner, and who shall give bonds in the sum of $25,000; but the commissioners may increase the penalty of said bond. The treasurer shall receive, keep and pay out, all moneys belonging to, or under the control of said commissioners, as ordered by them.

902c. Levy of tax. 24 G. A., ch. 1, § 3. Said commissioners may on or before the first Monday in September of each year, certify to the county auditor, the per cent. of taxes which they may deem necessary for park purposes, but which shall in no case exceed one mill on the dollar of the assessed valuation of the taxable property of said city. And the county auditor shall place the same on the tax books of the county, in the same manner as other taxes are placed thereon, and said taxes shall be collected by the county treasurer, shall be payable, become due, and be delinquent, at the same time as state and county taxes; and in all things relating to the collection of the same, and the sale of real or personal property therefor, said treasurer is authorized

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and required, to proceed according to the provisions of the statute relating to the collection and sale of property for state and county taxes, and all sales made by virtue of this act, shall be of the same validity, and shall in all respects be deemed and treated as though made for delinquent state or county taxes exclusively.

902d. Powers of commissioners. 24 G. A., ch. 1, § 4. Said board of park commissioners shall have all the powers conferred by, and shall be subject to all the provisions of this act. They are empowered and authorized to acquire real estate or other property within the city for park purposes, by donation, purchase or condemnation, and to sell or exchange any real estate acquired by them which they shall find unfit or not desirable for such purposes. They shall keep a record of all their transactions and shall have exclusive control of all the parks and pleasure grounds acquired by them, and also of any other grounds owned by the city and set apart for like purposes. They may make contracts and be contracted with, sue and be sued, but shall incur no indebtedness, in access [excess] of the amount of taxes already levied by them and available for the payment thereof, except, bonds hereby authorized, and they shall annually publish in some newspaper published in the city, or otherwise, an itemized statement of all moneys paid out or expended by them, and of all sums by them owing and unpaid. For the purpose of paying for real estate, said commissioners are authorized to issue bonds in such sums and amounts, as they may deem necessary, *provided*, that the aggregate annual interest on all bonds issued by them and at any time outstanding, shall not exceed four-fifths of the amount of the annual tax authorized by this act.

902e. Bonds. 24 G. A., ch. 1, § 5. The bonds issued by said commissioners, shall mature at such time as they may determine, but not earlier than twenty-five nor later than fifty years from their date. And there may be reserved therein, the right to refund at such time as the commissioners may determine, in case they can be refunded at a lower rate of interest, and all refunding bonds shall mature at the same time as those refunded. It shall be the duty of said commissioners, each year for fifteen years before the maturity of said bonds, to set aside, out of the tax levied by them, a sum equal to one-fifteenth of the principal of said bonds, which sum so set aside, shall be applied in payment of said principal, whenever the amount thereof on hand shall be sufficient to pay one or more of said bonds; and the right to so pay, upon such notice to the holders, as shall therein be prescribed, shall be reserved in said bonds.

902f. Lien. 24 G. A., ch. 1, § 6. The bonds issued under the provisions of this act, shall be a lien upon all the real estate acquired by the commissioners with the proceeds of said bonds, and said proceeds, shall be used for the purchase of real estate only. Said commissioners shall have power to mortgage said real estate to a trustee, for the purpose of securing the payment of said bonds, and there shall be pledged for the payment of the interest thereon, so much of the annual tax by this act authorized, as shall be necessary for the payment thereof, and the residue of said tax may be used by the commissioners in the purchase of real estate or improvement of the parks and pleasure grounds hereinbefore mentioned.

902g. Title; interest. 24 G. A., ch. 1, § 7. The title to all real estate acquired under the provisions of this act, shall be held by the commissioners in trust for the public, shall be exempt from taxation, of every kind and nature, and from all debts and liabilities of the city. That portion of the annual tax levied by said commissioners and pledged for the payment of interest on, or set apart for the payment of principal of said bonds, shall be used for no other purpose whatever, and it shall be the duty of said commissioners, to annually levy and certify to the county auditor, a tax sufficient to pro-

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vide for such payments, and if they shall neglect or fail so to do, the board of supervisors shall make a levy sufficient for such purposes.

902h. Separate townships. 24 G. A., ch. 1, § 8. Where any such city, shall contain more than one organized township, at least one commissioner shall be a resident of each of said townships; and, unless all of the commissioners shall agree upon the location of one park for a whole city, each township shall constitute a separate district for park purposes, and the proceeds of the bonds issued under this act, shall be apportioned to, and expended in each district, in proportion to the tax levied thereon, and all funds received from taxes collected, shall be expended in the same manner.

902i. Property condemned. 24 G. A., ch. 1, § 9. If said commissioners and the owners of any property desired by them for park purposes, cannot agree as to the price to be paid therefor, the commissioners may cause the same to be condemned, in the same manner provided by law for the condemnation of right of way for railroads, and all the provisions of law, relating to the condemnation of right of way for railroads, including the right of appeal, are hereby made applicable to such proceedings.

902j. 24 G. A., ch. 1, § 10. All acts or parts of acts in conflict herewith, are hereby repealed.

906. Special charters.

Provisions found in the charters of cities organized under special charter with reference to condemning lands for parks are by this section continued in force, although the provisions of §§ 636 and 650 with reference to the same matter are made specially applicable to such cities: *Arnold v. Council Bluffs*, 52 N. W. R., 347.

910a. Compensation of mayors. 23 G. A., ch. 16, § 1. Cities incorporated under special charters are hereby granted the power to fix the compensation of their mayors by ordinance of their respective city councils, as follows: In cities of ten thousand population, such compensation shall not exceed five hundred dollars. In cities of more than ten thousand and up to fifteen thousand population, according to the last preceding census, such compensation shall not exceed seven hundred and fifty dollars. And in cities of more than fifteen thousand and up to twenty thousand population, according to the last preceding census, such compensation shall not exceed one thousand dollars per annum. And for cities over twenty thousand not to exceed one thousand five hundred dollars per annum, which amount shall be in full compensation of all services of such mayor of every kind and character whatsoever connected with his official duties.

910b. Payments legalized. 23 G. A., ch. 16, § 2. In all cases where any such city has heretofore by ordinance or resolution of its city council paid its mayor compensation either as such mayor or as chief of police of said city or otherwise, such payment is hereby legalized and made valid.

943. Sewers in special charter cities. 16 G. A., ch. 54, § 1; 24 G. A., ch. 8. All cities in this state organized and existing under special charters, having a population of not less than ten thousand as shown by the last preceding state census, may provide by ordinance for the construction of sewers, or may divide the city into sewerage districts in such manner as the council may determine, and pay the cost of constructing same out of the general revenue of the city, or assess the cost upon the adjacent property, or may levy a certain sewerage tax within the sewerage district, out of which to pay for the construction of the same, which sewerage tax shall not exceed in any one year, five mills on the dollar of the assessed value of the property within such district. Or may pay a part of the cost of such construction out of the general revenue, a part by the assessment of adjacent property, and a part by levying a tax upon all the property within the sewerage district, or may pay for the same by pursuing any two of the methods herein named. *Provided*, that

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whenever it is deemed necessary or expedient by the council thereof, in order to carry off flowing water, to follow ravines, or for other reasons, to cause a main or lateral sewer to pass through private property, said cities shall have the power to condemn private property for the location of such sewers, to the necessary extent, and in the same manner as now provided by law for the condemnation of private property for the opening of streets therein, and that the cost of such condemnation shall constitute a part of the cost of any such sewer, and be collected accordingly.

[As amended so as to change the rate of the tax and add the proviso. 23 G. A., ch. 14, as amended by 24 G. A., ch. 9, relating to paving, curbing and sewer contracts in cities under special charter, was by 24 G. A., ch. 12, made applicable to other cities as well, and is inserted *supra*, §§ 750*a*-750*u*.]

960a. Special tax in lieu of road tax. 23 G. A., ch. 15; 24 G. A., ch. 13. In all cities existing under special charters, having a population of more than ten thousand under the census of 1885 whenever any real-restate may by ordinance be assessed with any special tax for the improvement of streets, then such real-estate, so specially assessed, and the special assessment upon which shall be paid, shall after such payment, be exempted from taxation for any general road or street tax which might thereafter be assessed against it for any year or years, so long as the amount of such general road or street tax against such property would not exceed the amount of such special tax: and to the amount of such special tax paid as aforesaid, such general road or street tax shall be considered as fully paid, satisfied and discharged.

[As amended by reducing the population required.]

960b. Board of public works. 24 G. A., ch. 4. All cities organized under special charter in this state in addition to the powers now granted, shall have the further and additional powers conferred by this act, as follows, to wit:

They shall have power to establish a board of public works which shall consist of such members as the city council may by ordinance prescribe. And the officers and members of such board of public works shall be appointed in such manner and for such length of time, and shall possess such qualifications, receive such compensation, be removable for such causes, possess such powers, perform such duties and be governed by such rules and regulations as the city council may lawfully from time to time prescribe by ordinance.

CHAPTER 12.

PLATS.

996. Validity; dedication of streets.

The fact that a plat is invalid does not affect a deed conveying lots according to a description in such plat, to which reference is made in the deed: *Young v. Cosgrove*, 49 N. W. R., 1040.

Where certain lots, supposed to constitute a block as laid out in a plat, were conveyed by number with reference to such block, and subsequently another plat was filed, by which such block contained another lot, and also a strip of land not designated by number, *held*, that the conveyance gave no right to any portion of such strip: *Ibid.*

The acknowledging and recording of a plat vests in the public whatever interest the grantor has, so far as the streets are concerned, but it does not establish the title of the public in the absence of a showing of title in the grantor: *Edenville v. Chicago, M. & St. P. R. Co.*, 77-69.

Where a street had been used for a number of years as a public thoroughfare, and the city by ordinance had required such street to be improved and the adjacent land-owners to build sidewalks, *held* that, though there had been no formal dedication of the street and no acceptance of the same by ordinance, the facts were sufficient to charge the city with liability for neglect to keep it in a safe condition: *Byerly v. Anamosa*, 79-204.

Where the owner of land dedicates a right of way for a street, and it is by the municipal authorities ordered to be paved, such action amounts to an adoption and recognition of it as a street, and it becomes a public highway: *Ford v. North Des Moines*, 80-626.

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TITLE V.

ELECTIONS AND OFFICERS.

CHAPTER 1

ELECTION OF OFFICERS AND THEIR TERMS.

1034. County officers. 589; 23 G. A., ch. 37, § 1. Each county shall elect at the general election in each even-numbered year, a clerk of the district [and circuit] court[s], and a recorder of deeds and county auditor; and in each odd-numbered year, a treasurer, a sheriff, a coroner, a county superintendent, and a surveyor; and each of said officers shall hold his office for the term of two years. [R., §§ 224, 472, 473; C., '51, § 96; 9 G. A., ch. 172, § 62; 10 G. A., ch. 100; ch. 129, §§ 3, 4; 12 G. A., ch. 160, § 1.]

[As amended so that the county auditor shall be elected in even-numbered years.]

1034a. Terms of auditors extended. 23 G. A., ch. 37, § 2. All county auditors elected in the year 1889 shall hold their office until the first Monday in January A. D. 1893 or until their successors are duly elected and qualified; such successors shall be elected in the year 1892 and each even-numbered year thereafter.

1034b. New bond. 23 G. A., ch. 37, § 3. It shall be the duty of the county auditor of each county to present at the regular January meeting in 1892 of the board of supervisors of his county, a good and sufficient bond, in such penal sum and with such conditions as are now prescribed by law for the official bond of such auditor, which said bond shall be the official bond of said auditor for the year 1892 and shall be subject to approval as now provided by law for the approval of bonds of county auditors. And in case any county auditor shall fail to furnish such bond as in this section required to be presented and approved, such failure shall create a vacancy in the office of such county auditor in his county for the year 1892, and such vacancy shall thereupon be filled as now provided by law for filling vacancies in said office.

1036. Additional justices and constables.

[By 23 G. A., ch. 30, the election and acts of additional justices and constables, elected without the notice required by this section, are legalized.]

Record of the direction of the trustees for the election of additional justices should be preserved in the records of their proceedings, and where no record of any such direction or order appears, more than two justices of the peace cannot properly be elected: *State v. Gaston*, 79–457.

1041. Township clerk and trustee.

[By 24 G. A., ch. 10, the offices of township clerk and township trustee are abolished in certain cities, and their duties are devolved upon city officers. See *supra*, §§ 526*a*–526*d*.]

CHAPTER 2*a*.

MANNER OF HOLDING ELECTIONS.

1063a. To what elections applicable. 24 G. A., ch. 33, § 1. In all elections to be held after November 1, 1892, in the state for public officers (except those elected at school elections), the voting shall be by ballots printed

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and distributed at public expense as hereinafter provided, and no other ballots shall be used.

1063b. Expenses. 24 G. A., ch. 33, § 2. The printing and distributing of ballots and cards of instruction to the voters, as hereinafter described, for any general election, shall be at the expense of the county, and shall be provided for in the same manner as other county election expenses; and the printing and distributing of ballots for use in city elections shall be at the expense of the city or town in which such election shall be held. The term "general election," as used in this act, shall apply to any election held for the choice of national, state, judicial, district, county or township officers, whether for the full term or for the filling of a vacancy. The term "city election," shall apply to any municipal election held in a city or incorporated town.

1063c. Nominations. 24 G. A., ch. 33, § 3. Any convention of delegates, primary, caucus or meeting of qualified voters as hereinafter defined, and individual electors to the number and in the manner hereinafter specified, may nominate candidates for public office, whose names shall be placed upon the ballots to be furnished as hereinafter provided.

1063d. Parties. 24 G. A., ch. 33, § 4. Any convention of delegates, primary, caucus or meeting representing a political party, which at the general election next preceding polled at least two per cent. of the entire vote cast in the state or division thereof, or municipality for which the nomination is made, may for the state or division thereof, or municipality for which the convention, primary, caucus or meeting is held, as the case may be, by causing a certificate of nomination to be duly filed, make one such nomination for each office therein to be filled at the election. Every such certificate of nomination shall state such facts as are required in section six of this act [§ 1063*f*], and shall be signed by the presiding officer and by the secretary of the convention, caucus or meeting, who shall add to their signatures their places of residence. Where such nomination is made by a primary election, the certificate shall be signed by the board of canvassers, to which the returns of such primary election are made. Such certificate shall be sworn to by them to be true, to the best of their knowledge and belief, and a certificate of the oath shall be annexed to the certificate of nomination.

1063e. Candidates at large. 24 G. A., ch. 33, § 5. Nominations for candidates for any office to be filled by the voters of the state at large may also be made by nomination papers, signed in the aggregate for each candidate by not less than five hundred qualified voters of the state. Nominations of candidates for offices to be filled by the electors of a county, district or other division less than the state, may be made by nomination papers, signed in the aggregate for each candidate by not less than twenty-five qualified voters of such county, district or division. Nominations of candidates for offices to be filled by the electors of a city, town, precinct or ward may be made by nomination papers signed in the aggregate for each candidate by not less than ten qualified voters of such city, town, precinct or ward; provided, that the name of any candidate, whose name may appear in any other place upon the ballot, shall not be so added by petition for the same office. Each elector signing a certificate shall add to his signature his place of business and post-office address.

1063f. Certificates of nomination. 24 G. A., ch. 33, § 6. All certificates of nomination, or nomination papers, shall, besides containing the names of candidates, specify as to each:

1. The office to which he is nominated.
2. The party or political principle which he represents, expressed in not more than five words.
3. His place of residence, with street and number thereof, if any.

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In case of electors for president and vice-president of the United States, the names of the candidates for president and vice-president may be added to the party or political appellation.

1063g. Filing. 24 G. A., ch. 33, § 7. Certificates of nomination, and nomination papers for the nomination of candidates for offices to be filled by the electors of the entire state, or any division or district greater than a county, shall be filed with the secretary of state not more than sixty days and not less than thirty days before the day fixed by law for the election for which the candidates are nominated. All other certificates for the nomination of candidates shall be filed with the county auditor of the respective counties, not more than sixty days and not less than twenty days previous to the day of such election: provided, that certificates of nomination and nomination papers for the nomination of candidates for the offices in cities and incorporated towns shall be filed with the clerks or recorder of the cities or incorporated towns not more than forty days and not less than ten days previous to such election.

1063h. Inspection of papers. 24 G. A., ch. 33, § 8. Any person whose name has been presented as a candidate may cause his name to be withdrawn from nomination by his request in writing, signed by him and acknowledged before an officer qualified to take acknowledgment of deeds, and filed with the secretary of state not less than fifteen days, or with the proper auditor, clerk or recorder not less than eight days previous to the day of election, and no name so withdrawn shall be printed upon the ballots. All certificates of nomination and nomination papers, when filed, shall be open, under the proper regulation, to public inspection, and the secretary of state and the several county auditors, clerks and recorders having charge of nomination papers shall preserve the same in their respective offices for not less than six months after the election.

1063i. Vacancy filled. 24 G. A., ch. 33, § 9. In case a candidate who has been duly nominated, under the provisions of this act, die before election day or decline the nomination as in this act provided, or should any certificate of nomination be held insufficient or inoperative by the officer with whom they may be filed, the vacancy or vacancies thus created may be filled by the political party or other persons making the original nominations, or, if the time is insufficient therefor, then the vacancy may be filled, if the nomination was by convention, primary or caucus, in such a manner as the convention, primary or caucus had previously provided, or in case of no such previous provisions, then by a regularly elected or appointed executive or central committee, representing the political party or persons holding such convention, primary meeting or caucus. The certificates of nominations made to supply such vacancy, shall state in addition to the facts hereinbefore required by this act, the name of the original nominee, the date of his death or declination of nomination, or the fact that the former nomination has been held insufficient or inoperative and the measures taken in accordance with the above requirements for filling a vacancy, and it shall be signed and sworn to by the presiding officer and secretary of the convention, primary or caucus, or by the chairman and secretary of the duly authorized committee as the case may be.

1063j. Objections to nominations. 24 G. A., ch. 33, § 10. The certificates of nomination and nomination papers being so filed, and being in apparent conformity with the provisions of this act, shall be deemed to be valid, unless objection thereto is duly made in writing. Such objections or other questions arising in relation thereto in the case of nomination of state officers or officers to be elected by the voters of a division less than the state and greater than a county, shall be considered by the secretary of state, auditor of state and attorney-general, and the decision of the majority of these offi-

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cers shall be final. Such objections or questions arising in the case of nominations for officers to be elected by the voters of a county or township, shall be considered by the county auditor, clerk of the district court and county attorney for such county, and the decision of a majority of said officers shall be final. Objections or questions arising in the case of nominations for city or incorporated town officers shall be considered by the mayor and clerk or recorder, with whom one councilman or trustee thereof as the case may be, chosen by lot, shall act, and the decision of a majority of such officers shall be final. In any case where objection is made, notice shall forthwith be given to the candidates affected thereby, addressed to their place of residence as given in the nomination papers, and stating the time and place, when and where such objections will be considered.

1063k. Duty of secretary of state as to vacancy. 24 G. A., ch. 33, § 11. When such certificate is filed with the secretary of state, he shall, in certifying nominations to the various county auditors, insert the name of the person thus nominated to fill a vacancy in place of the original nominee; and in the event that he has already sent forward his certificate, he shall forthwith certify to the auditors of the proper counties the name and description of the person so nominated to fill the vacancy, the office he is nominated for, with the other details mentioned in certificates of nomination filed with the secretary of state; he shall immediately certify the name so supplied to the authorities charged with the printing of the ballots. The name so supplied for the vacancy shall, if the ballots are not already printed, be placed on the ballots in place of the name of the original nominee; or, if the ballots have been printed, new ballots, whenever practicable, shall be furnished.

1063l. Changing ballots. 24 G. A., ch. 33, § 12. Whenever it may not be practicable to have new ballots printed it shall be the duty of the election officer having charge of the ballots to place the name supplied for the vacancy upon each ballot issued before delivering it to the voter; the name so supplied may be placed upon the ballots either by affixing a paster, or by writing or stamping the name on the ballot; and to enable this to be done, the officer with whom the certificates of nomination are to be filed, shall immediately furnish the name of such substituted nominee to all judges of election within the territory in which such nominee may be a candidate; provided, that in all cases where certificates of nomination or nomination papers are filed with the secretary of state he shall be required only to immediately furnish the name of such substituted nominee to the county auditors within said territory and it shall then be the duty of the county auditor to furnish such information to the judges of election as hereinbefore stated.

1063m. Names of candidates. 24 G. A., ch. 33, § 13. Not less than fifteen days before an election to fill any public office the secretary of state shall certify to the county auditor of each county within which any of the electors may by law vote for candidates for such office, the name and residence of each person nominated for such office, as specified in the certificates of nomination or nomination papers filed with the secretary of state.

1063n. Form of ballots. 24 G. A., ch. 33, § 14. The names of all candidates to be voted for in each election district or precinct shall be printed on one ballot; all nominations of any political party or group of petitioners being placed under the party appellation or title of such party or group, as designated by them in their certificates of nomination or petitions, or, if none be designated, then under some suitable title, and the ballot shall contain no other names, except that, in case of electors for president and vice-president of the United States, the names of the candidates for president and vice-president may be added to the party or political designation. If a constitutional amendment or other public measure is submitted to a vote, such question

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○ REPUBLICAN.	○ DEMOCRATIC.	○ PROHIBITION.	○ UNION LABOR.
For Governor,	*For Governor,*	*For Governor,*	*For Governor,*
☐ HIRAM C. WHEELER.	☐ HORACE BOIES,	☐ ISAAC T. GIBSON.	☐ A. J. WESTFALL.
For Lieutenant-Governor,	*For Lieutenant-Governor,*	*For Lieutenant-Governor,*	*For Lieutenant-Governor.*
☐ GEO. VAN HOUTEN.	☐ S. L. BESTOW.	☐ J. G. LITTLER.	☐ WILLIAM S. SCOTT.
For Judge of Sup. Court,	*For Judge of Sup. Court,*	*For Judge of Sup. Court,*	*For Judge of Sup. Court,*
☐ S. W. WEAVER.	☐ L. G. KINNE.	☐ DANIEL B. TURNEY.	☐ T. F. WILLIS.

(And continuing in like manner as to all candidates to be voted for at such elections.)

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shall be printed upon the ballot after the lists of candidates, and words calculated to aid the voter to answer any question submitted to vote may be added, such as "Yes," "No," or the like. On the back or outside of the ballot, so as to appear when folded, shall be printed the words "Official ballot," followed by the designation of the polling place for which the ballot is prepared, the date of the election, and a *fac-simile* of the signature of the auditor or other officers who has caused the ballot to be printed. The ballots shall be on plain white paper, through which the printing or writing cannot be read. The party appellation or title shall be printed in capital letters, not less than one-fourth of an inch in height; and a circle one-half inch in diameter should be printed at the beginning of the line in which such appellation or title is printed. The names of candidates shall be printed in capital letters, not less than one-eighth nor more than one-fourth of an inch in height and at the beginning of each line in which the name of a candidate is printed a square shall be printed, the sides of which shall not be less than one-fourth of an inch in length. The list of candidates for the several parties and groups of petitioners shall be placed in separate columns on the ballots, in such order as the authorities charged with the printing of the ballots shall decide. Each of the columns containing the list of candidates including the party appellation shall be separated by a distinct line.

1063o. How printed and furnished. 24 G. A., ch. 33, § 15. For all elections to which this act applies, the county auditors in their respective counties shall have charge of the printing of the ballots for all general elections, and shall furnish them to the judges of such elections. The city clerk and recorder of incorporated towns shall have charge thereof and furnish them in all municipal elections. Ballots shall be printed and in the possession of the officer charged with their distribution at least two days before the election, and subject to the inspection of candidates and their agents. If any mistakes be discovered they shall be corrected without delay. The officers so charged with the printing of the ballots shall cause to be delivered to the judges of election, at the polling place of each voting precinct, not less than twelve hours before the time as fixed by law for the opening of the polls therein, one hundred ballots of the kind to be voted in such precinct for every fifty votes or fraction thereof cast therein at the last preceding election for state officers. Such ballots shall be put up in separate sealed packages, with marks on the outside clearly designating the polling place for which they are intended, and the number of ballots inclosed and receipt therefor shall be given by the judge or judges of election to whom they are delivered, which receipt shall be preserved by the officer charged with the printing of the ballots. The officer or authorities charged with the printing and distributing of the ballots shall provide and retain at his or their office an ample supply of ballots in addition to those distributed to the several voting precincts, and if at any time, on or before the day of election the ballots furnished to any precinct shall be lost, destroyed or exhausted, before the polls are closed, on written application, signed by a majority of the judges of such precinct or signed and sworn to by one of such judges, he shall immediately cause to be delivered to such judges, at the polling place, such additional supply of ballots as may be required, and sufficient to comply with the provisions of this act.

1063p. Ballots on amendments to constitution. 24 G. A., ch. 33, § 16. Whenever a constitutional amendment or other public measure is proposed to be voted upon by the people, such amendment or other public measure shall be printed in full upon the ballot preceded by the words: "Shall the following amendment to the constitution (or public measure) be adopted?" Two spaces shall be left upon the right-hand margin, one for votes favoring

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the amendment, or public measure, to be designated by the word "Yes," and one for the votes opposing the amendment or measure to be designated by the word "No," as in the form herein given.

Shall the following amendment to the constitution (or public measure) be adopted:

[Here insert in full the proposed public measure or constitutional amendment.]

YES	X
NO	

The elector shall designate his vote by a cross-mark, thus (x).

1063q. Instructions to voters. 24 G. A., ch. 33, § 17. The officer or officers, whose duty it is to have the ballots printed, shall prepare full instructions for the guidance of voters at each election, as to obtaining ballots, as to the manner of marking them and the method of gaining assistance, and as to obtaining new ballots in place of those accidentally spoiled; and they shall respectively cause the same, together with copies of sections 22, 23, 24, 25, 26, 27, 28 and 29 of this act [§§ 1063*v*–1063*cc*] to be printed in large, clear type on separate cards, to be called cards of instruction; and such officer or officers shall furnish to the judges of election a sufficient number of such cards of instruction to enable the judges of election to comply with the provisions of this act.

1063r. Instructions. 24 G. A., ch. 33, § 18. The judges of election shall cause not less than one of such cards to be posted in each voting booth or apartment provided for the preparation of ballots, and not less than four of such cards to be posted in and about the polling place upon the day of election. Judges of election shall, not less than five days prior to an election, cause to be conspicuously posted in five or more public places in their voting precinct a card of instruction and a specimen ballot printed on colored paper, containing the names, residence and party or political affiliation of all candidates nominated, as herein provided and to be voted for in such precinct, substantially in the form of the general ballot to be used. The county auditor shall cause to be published prior to the day of election in at least two newspapers, if there be so many published in such county, representing the political parties which cast at the preceding general election the largest and next largest number of votes, a list of all the nominations made as herein provided and to be voted for at such election as near as may be in the form in which they shall appear upon the general ballot; provided that publication by the county auditor shall not be required for or apply to the election of township or municipal officers.

1063s. Election boards. 24 G. A., ch. 33, § 19. Election boards shall be composed of three judges and two clerks. The judges of election of their respective election precincts shall have charge of the ballots and furnish them to the voters as hereinafter set forth. Not more than two judges and not more than one clerk shall belong to the same political party or organization; provided, always, there be one or more electors qualified and willing to act as such judge or clerk, and belonging to and a member or members of opposite parties. In municipalities the councilmen or trustees shall be ex-officio judges of election; provided, that in case more than two councilmen or trustees belonging to the same political party or organization be residents of the same election precinct, the county board of supervisors may designate which of the councilmen or trustees shall serve as judges at general elections in such precincts. In township precincts the clerk of the township shall be ex-officio, a clerk of election of the precinct in which he resides, and the trustees of the township shall be ex-officio judges of election, except that in townships not divided into election precincts, if all the trustees be of the same political party,

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those two only whose terms expire in one and two years, shall be ex-officio judges of such precinct. The membership of such election board shall be completed by the board of supervisors from the party unrepresented which cast the largest or next largest number of votes in said precinct at the last general election; and as now provided by law and in conformity with this act; provided, that in all city elections the powers and duties hereinbefore given and made incumbent upon the board of supervisors shall be exercised and performed by the city council or trustees of incorporated towns. If at the opening of the polls in any precinct there shall be a vacancy in the office of clerk or judge of election, the same shall be filled by the members of the board present and from the political party which is entitled to such vacant office under the provisions of this act.

1063t. Place and arrangements for holding election. 24 G. A., ch. 33, § 20. It shall be the duty of the township trustees, and, in cities and towns, of the mayor and clerk or recorder, to provide suitable places in which to hold all elections provided for by this act, and to see that the same are warmed, lighted and furnished with proper supplies and conveniences, including a sufficient number of booths, shelves, pens, penholders, ink, blotters and pencils as will enable the voter to prepare his ballot for voting, and in which voters may prepare their ballots, screened from all observation as to the manner in which they do so. A guard-rail shall be so constructed and placed that only such persons as are inside said rail can approach within six feet of the ballot box, and of such voting booths. The arrangements shall be such that the voting booths can only be reached by passing within said guard-rail. They shall be in plain view of the election officers, and both they and the ballot boxes shall be in plain view of those outside of the guard-rail. Each of said booths shall have three sides inclosed, one side in front, to open and shut by a door swinging outward or to be closed with a curtain. Each side of each booth shall be seven feet high, and the door or curtain shall extend to within two feet of the floor, which shall be closed while the voter is preparing his ballot; and such booths shall be well lighted. Each booth shall be at least three feet square, and shall contain a shelf at least one foot wide, at a convenient height for writing. No person other than the election officers and the challengers allowed by law and those admitted for the purpose of voting as hereinafter provided, shall be permitted within the guard-rail, except by the authority of the election officers, to keep order and enforce the law. The number of such voting booths shall not be less than one to every sixty voters, or fraction thereof, who voted at the last preceding election in the precinct. The expense of providing booths and guard-rails, and other things required in this act, shall be paid in the same manner as other election expenses. Said booths or compartments shall be so built and arranged, if possible, as to be permanent, so that after the election they may be taken down and deposited with the township or city clerk or town recorder, as the case may be, for safe keeping for all future use. In all cases where it is practicable, in precincts outside of cities and towns, the elections shall be held in the public school building, for the use of which there shall be no charge. But all damage to the building or furniture shall be a just claim against the county.

1063u. Ballots issued. 24 G. A., ch. 33, § 21. Any person desiring to vote in precincts where registration is required, shall give his name, and, if required to do so, his residence, to the judges of election, one of whom shall thereupon announce the same in a loud and distinct tone of voice, clear and audible; and if such name is found on the register of voters by the officer having charge thereof, he shall likewise repeat such name, and the voter shall be allowed to enter the space inclosed by the guard-rail, as above provided. One of the judges shall give the voter one, and only one ballot, on the back

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of which such judge shall indorse his initials in such manner that they may be seen when the ballot is properly folded, and the voter's name shall immediately be checked on the registry list. At all elections, where registration is required, if the name of any person desiring to vote at such election is not found on the register of voters, he shall not receive a ballot until he shall have complied with the law prescribing the manner and conditions of voting by unregistered voters. If any person desiring to vote at any election shall be challenged, he shall not receive a ballot until he shall have established his right to vote in the manner provided by law. Besides the election officers, not more than two voters in excess of the whole number of voting booths provided shall be allowed in said inclosed space at one time. This section shall apply to and govern, where applicable, all persons desiring to vote in precincts where registration is not required.

1063v. Preparation of ballots. 24 G. A., ch. 33, § 22. On receipt of his ballot, the voter shall forthwith, and without leaving the inclosed space, retire alone to one of the voting booths so provided, and shall prepare his ballot by making in the appropriate margin or place a cross (X) opposite the name of the candidate of his choice for each office to be filled, or by writing in the name of the candidate of his choice in a blank space on said ticket, making a cross (X) opposite thereto; and in case of a question submitted to the vote of the people, by making in the appropriate margin or place a cross (X) against the answer he desires to give; provided, however, if he shall desire to vote for all the candidates of one political party, or group of petitioners, he may place such mark at the appropriate place, preceding the appellation or title under which the names of the candidates of such party or group of petitioners, are printed; and the ballots so marked shall be counted as cast for all the candidates named after that title; provided, further, that the voter may place such mark at the appropriate space preceding the appellation or title of any one party or group of petitioners, and may also mark, at the appropriate place preceding the name or names of one or more candidates printed under the appellation or title of some other party, or group of petitioners, and a ballot so marked shall be counted as cast for all candidates named under the appellation or title which has been so marked, except as to the officers to which he has placed such mark preceding the name or names of some other candidate or candidates printed under the title of some other party or group of petitioners, and as to such, it shall be counted as cast for the candidate or candidates preceding whose name or names such mark may have been placed. Before leaving the voting booth the voter shall fold his ballot in such a manner as to conceal the marks thereon. The number of the voter on the poll books or register list shall not be indorsed on the back of his ballot. He shall mark and deposit his ballot without undue delay, and shall quit said inclosed space as soon as he has voted. No voter shall be allowed to occupy a voting booth already occupied by another, nor remain within said inclosed space more than ten minutes, nor to occupy a voting booth more than five minutes, in case all of said voting booths are in use and other voters waiting to occupy the same. No voter, not an election officer, shall, after having voted, be allowed to enter said inclosed space during said election. No person shall take or remove any ballot from the voting place before the close of the poll. No voter shall vote, or offer to vote, any ballot except such as he has received from the judges of election in charge of the ballots. Any voter who shall, by accident or mistake, spoil his ballot, may on returning said spoiled ballot to the election judges, receive another in place thereof. Any voter who, after receiving an official ballot, decides not to vote, shall, before retiring from within the guard-rail, surrender to the election officers the official ballot which has been given him; and a refusal to surrender such ballot shall subject the

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person so offending to immediate arrest and the penalties affixed in section twenty-seven of this act [§ 1063*aa*].

1063w. Inability to read; physical disability. 24 G. A., ch. 33, § 23. Any voter who may declare upon oath that he cannot read the English language, or that by reason of any physical disability he is unable to mark his ballot, shall, upon request, be assisted in marking his ballot by two of the election officers of different political parties to be selected from the judges and clerks of the precinct in which they are to act, to be designated by the judges of election of each precinct at the opening of the polls. Such officers shall mark the ballot as directed by the voter, and shall thereafter give no information regarding the same. The clerks of election shall enter upon the poll lists, after the name of any elector who received such assistance in marking his ballot, a memorandum of the fact. Intoxication shall not be regarded as a physical disability, and no intoxicated person shall be entitled to assistance in marking his ballot.

1063x. Employees. 24 G. A., ch. 33, § 24. Any person entitled to a vote at a general election in this state shall, on the day of such election, be entitled to absent himself from any services or employment in which he is then engaged or employed for a period of two hours, between the time of opening and closing the polls, and such voter shall not, because of so absenting himself, be liable to any penalty, or shall any deduction be made on account of such absence from his usual salary or wages; provided, however, that application for such leave of absence shall be made prior to the day of election. The employer may specify the hours during which said employee may absent himself as aforesaid. Any person or corporation who shall refuse to an employee the privilege hereby conferred, or shall subject an employee to a penalty or deduction of wages because of the exercise of such privilege, or who shall in any manner attempt to influence or control such voter as to how he shall vote, by offering any reward or by threatening his discharge from employment, or otherwise intimidating him from a full and free exercise of his right to vote, or shall, directly or indirectly, violate the provisions of this section, shall be deemed guilty of a misdemeanor, and be fined in any sum not less than five dollars or more than one hundred dollars.

1063y. Unvoted ballots; result announced; ballots preserved. 24 G. A., ch. 33, § 25. If a voter marks more names than there are persons to be elected to an office, or if for any reason it is impossible to determine the voter's choice for any office to be filled, his ballot shall not be counted for such office. No ballot without the official indorsement shall be allowed to be deposited in the ballot box, and none but ballots provided in accordance with the provision of this act shall be counted. Ballots not counted shall be marked "defective" on the back thereof, and ballots to which objection has been made by either of the judges or challengers, shall be marked "objected to" on the back thereof, and a memorandum, signed by the judges, stating how it was counted, shall be written upon the back of each ballot so marked; and all ballots marked "defective" or "objected to," shall be inclosed in an envelope, securely sealed, and so marked and indorsed as to clearly disclose its contents. All ballots not voted, and all that have been spoiled by voters while attempting to vote, shall be returned by the judges of election to the officer or authorities charged with the printing and distribution of the ballots, and a receipt taken therefor, and shall be preserved for six months. Such officer shall keep a record of the number of ballots delivered for each polling place, the name of the person to whom, and the time when delivered; and he shall also enter upon such record the number and character of the ballots returned, with the time when and the person by whom they are returned. When the canvass shall have been completed as now provided by law, the

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clerks shall announce to the judges the total number of votes received by each candidate; at least one judge of the election shall then proclaim in a loud voice the total number of votes received by each of the persons voted for and the office for which he is designated, as announced by said clerks, and the number of votes for and the number of votes against any proposition which shall have been submitted to a vote of the people; immediately after making such proclamation, and before separating, the judges shall fold in two folds, and string closely upon a single piece of flexible wire, all ballots which have been counted by them except those marked "objected to," unite the ends of such wire in a firm knot, seal the knot in such manner that it cannot be untied without breaking the seal, inclose the ballots so strung in an envelope and securely seal such envelope in such a manner that it cannot be opened without breaking the seal, and return said ballots, together with the package with the ballots marked "defective" or "objected to," in such sealed package or envelope, to the proper auditor, clerk or recorder, as the case may be, from whom the same were received, and such officer shall carefully preserve such ballots for six months, and at the expiration of that time shall destroy them by burning without previously opening the package or envelope. Such ballot shall be destroyed in the presence of the official custodian thereof, and two electors of approved integrity and good repute and members respectively of the two leading political parties. The said electors shall be designated by the chairman of the board of supervisors of the county in which such ballots are kept; provided, that if any contest of the election of any officer voted for at such election shall be pending at the expiration of said time, the said ballots shall not be destroyed until such contest is finally determined. In all cases of contested elections, the parties contesting the same shall have the right to have said ballots opened, and to have all the errors of the judges in counting or refusing to count any ballots, corrected by the court or body trying such contest; but such ballots shall be opened only in open court, or in open session of such body, and in the presence of the officer having the custody thereof.

1063z. Interference with voters. 24 G. A., ch. 33, § 26. No person whatever, shall do any electioneering or soliciting of votes on election day within any polling place, or within one hundred feet of any polling place. No person shall interrupt, hinder or oppose any voter while approaching the polling place for the purpose of voting. Whoever shall violate the provisions of this section shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars or imprisonment for not less than ten days, nor exceeding thirty days, or by both fine and imprisonment, for each and every offense; and it shall be the duty of the judges of election to enforce the provisions of this section.

1063aa. Influencing voters. 24 G. A., ch. 33, § 27. Any voter who shall, except as herein otherwise provided, allow his ballot to be seen by any person with an apparent intention of letting it be known how he is about to vote, or who shall make a false statement as to his inability to mark his ballot, or any person who shall interfere, or attempt to interfere, with any voter when inside said inclosed space, or when marking his ballot, or who shall endeavor to induce any voter, before voting, to show how he marks, or has marked his ballot, or any person who shall mark or cause in any manner to be marked, on any ballot, any character for the purpose of identifying said ballot, shall be punished by a fine of not less than five dollars nor more than one hundred dollars, or imprisonment for not less than ten days, nor exceeding thirty days, or by both fine and imprisonment; and it shall be the duty of the election judges to enforce the provisions of this section.

1063bb. Interference with election. 24 G. A., ch. 33, § 28. Any person who shall, prior to any election, wilfully destroy or deface any list of candi-

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dates posted in accordance with the provisions of this act, or who, during an election, shall wilfully deface, tear down, remove or destroy any card of instruction or specimen ballot, printed and posted for the instruction of voters, or who shall, during an election, wilfully remove or destroy any of the supplies or conveniences furnished to enable voters to prepare their ballots, or shall wilfully hinder the voting of others, shall be punished by a fine of not less than ten dollars nor more than one hundred dollars, or by imprisonment for not less than ten days nor exceeding thirty days, or by both fine and imprisonment.

1063cc. Destroying or falsifying papers. 24 G. A., ch. 33, § 29. Any person who shall falsely make, or wilfully destroy, any certificate of nomination, or nomination papers, or any part thereof, or any letter of withdrawal, or file any certificate of nomination, or nomination papers, knowing the same, or any part thereof, to be falsely made, or suppress any certificate of nomination, or nomination papers, or any part thereof, which have been duly filed, or forge, or falsely make the official indorsement on any ballot, or substitute therefor any spurious or counterfeit ballot, or make, use, circulate, or cause to be made or circulated, as an official ballot, any paper printed in imitation or resemblance thereof, or wilfully destroy or deface any ballot, or wilfully delay the delivery of any ballots, shall be punished by a fine of not less than one hundred dollars and not exceeding one thousand dollars, or by imprisonment in the penitentiary not less one year and not exceeding five years, or by both fine and imprisonment.

1063dd. Misconduct of officers. 24 G. A., ch. 33, § 30. Any public officer upon whom a duty is imposed by this act who shall wilfully neglect to perform such duty, or who shall wilfully perform it in such a way as to hinder the object of this act, or shall disclose to any one except as may be ordered by any court of justice, the contents of any ballot, as to the manner in which the same may have been voted, shall be punished by a fine of not less than five dollars, nor more than one thousand dollars or by imprisonment in the penitentiary for not less than one year, and not exceeding five years, or by both fine and imprisonment.

1063ee. Act printed. 24 G. A., ch. 33, § 31. It shall be the duty of the secretary of state, with the aid and advice of the attorney-general, to cause three thousand copies of this act to be printed immediately, in pamphlet form, with all necessary forms and instructions, to assist election officers to carry it into effect, and to distribute the same among the county auditors of the several counties of the state.

1063ff. Polls open. 24 G. A., ch. 33, § 32. At all elections to which this act applies the polls shall be open at eight o'clock in the morning, and shall be closed at six o'clock in the evening, but may be held open until eight o'clock in the evening provided a proclamation was so made at the time of the opening of the polls.

1063gg. Newspaper publication of act. 24 G. A., ch. 33, § 33. It shall be the duty of the board of supervisors of each county at their June meeting after the passage of this act, to select two newspapers, one from each of the two political parties casting the greatest number of votes for governor at the election in 1891, in which this law shall be published; provided, that the payment for such publication shall be fixed by said board of supervisors, but in no case shall it exceed the sum of thirty dollars to each newspaper publishing the same. When the board of supervisors has selected the newspapers in which the law shall be published, it shall be the duty of the county auditor to certify such action to the secretary of state, who shall at once furnish to each of said papers a copy of the law, and upon the receipt by the secretary of state of a copy of said paper with an affidavit of the publisher, or

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business manager, that the law was published in each and every copy of said paper on a certain date (which shall not be later than thirty days after its receipt from the secretary of state), the secretary of state shall certify the amount fixed for payment for the publication of this law in said paper to the state auditor who shall draw his warrant on the state treasurer for the sum named; provided, that the non-publication of this law, as herein provided, shall not invalidate the law.

1063hh. Election of assessor and road supervisor. 24 G. A., ch. 33, § 34. The provisions of this act shall not apply in so far as they may conflict with chapter 71, acts of the Seventeenth General Assembly [§§ 1082–1084], relating to the election of township assessor and road supervisors.

1063ii. 24 G. A., ch. 33, § 35. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

1086. Ballots.

The instructions with reference to the facts of a particular case, holding that the intention of the voter should not be defeated by the misspelling of the name of the candidate on the ticket, or the employment of wrong initials, or other slight differences of name, and that where the ballot contained a printed name and also a written name for the same office, the writing should be deemed to supersede the printing, *held* correct: *Brown v. McCollum*, 76–479.

1088. Excess of names.

This section is intended to apply where more than one officer is to be elected to the same office. If a ticket contains a printed and also a written name for an office for which but one officer is to be elected, the writing will control the printing: *Brown v. McCollum*, 76–479.

1101. Recanvass.

A writ of *mandamus* will not issue to compel a canvassing board to re-assemble and canvass the return of votes for an office and declare the candidate receiving a majority of the votes cast therefor to be elected, after the expiration of the term for which he was elected: *Potts v. Tuttle*, 79–253.

CHAPTER 5.

QUALIFICATION FOR OFFICE.

1139. Treasurer's bond.

The remedy upon the bond of a defaulting officer is not exclusive, but the county may pursue its property in the hands of one who has it wrongfully, or recover its value from any one who has converted it to his own use: *Taylor County v. Standley*, 79–666.

1156. Accounting.

While it is the duty of the board of supervisors to require an officer to account for all public funds which have come into his hands under color of his office, before approving his bond for the second term, neither the failure to perform that duty, nor a false representation that it has been performed, will release the sureties on the bond from liability for a defalcation occurring subsequently to the approval of the bond: *Palmer v. Wood*, 75–402.

When an officer was elected at a regular meeting of the directors of a school district, and the meeting adjourned to a certain day for the purpose of learning whether he would accept or not, and at the adjourned meeting he refused to accept, *held*, that his refusal was the same as if made at the regular meeting, and the board had the same power to elect another person as if no ballot had been cast; and the fact that such election was at an adjourned meeting would not give the incumbent a right to qualify and retain the office for another term: *Carter v. McFarland*, 75–196.

In an action to recover money belonging to the county, alleged to have been obtained by defendant by fraudulent collusion with the county treasurer, statements made by the treasurer at the time of his semi-annual settlements with the board of supervisors, though some of such statements were made prior to the last satisfactory settlement, *held* properly admitted in evidence as tending to show the amount of money for which the treasurer was liable at different times, and as tending to show, in connection with other facts, the dealings between the treasurer and defendant: *Taylor County v. Standley*, 79–666.

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CHAPTER 6.

CONTESTING ELECTIONS.

1158. Who may contest.

Since the enactment of the statute which authorizes women to hold school offices, a woman claiming to have been elected to such office may contest the election of another, although she is not an elector, within the terms of this and other sections relating to such contests. The statute making women eligible to such offices must be regarded as having amended these sections in that respect: *Brown v. McCollum*, 76–479.

As to sufficiency of ballots, see notes to § 1086.

1163. Statement.

The contestant may, after the expiration of the twenty days allowed for filing written statement of contest, amend the grounds of contest stated: *Brown v. McCollum*, 76–479.

1168. Proceedings.

The provisions of this and other sections plainly imply that contestant may, after the expiration of the twenty days allowed for filing statement of grounds of contest, amend such statement by setting out additional grounds: *Brown v. McCollum*, 76–479.

CHAPTER 8.

DEPUTIES.

1238. Deputy sheriff.

The official acts of the deputy sheriff are in law the acts of his principal, and the interest which will prevent the principal from acting will disqualify his deputy: *Gollsbitsch v. Ranbon*, 51 N. W. R., 48.

1243. Compensation.

This section relates to the employment of temporary assistance without the authority of the board of supervisors, and is not in conflict with § 5067, which relates to the employment of a permanent officer with the authority of the board: *Harris v. Chickasaw County*, 77–845.

And where the necessity of such temporary assistance was shown, and the board of supervisors refused to furnish it, and the officer employed a clerk and paid him a reasonable compensation, *held*, that he was entitled to recover from the county: *Ibid.*

Where the clerk of the courts, without previous application to the supervisors, paid out money to procure necessary assistance in his office, *held*, that the supervisors were bound to make reasonable compensation for such services: *Gamble v. Marion County*, 52 N. W. R., 556.

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TITLE VI.

REVENUE.

CHAPTER 1.

ASSESSMENT.

1271. Exemptions.

Lands granted to a railroad on condition that it comply with certain terms in the construction of its road become taxable as soon as such terms are complied with, although the lands are not yet certified or patented: *Whitehead v. Plummer*, 76–181.

Public lands entered by a military land warrant continue exempt from state taxation under the statutes of this state until three years after the patent issues thereon, it being so provided by the act of congress admitting the state into the Union: *Churchill v. Sowards*, 78–472.

Certain land being exempt from taxation, as swamp land belonging to the county, *held*, that acts of officers of the county in assessing it for taxation would not estop a subsequent purchaser of the county from asserting his title under the swamp land grant: *Hays v. McCormick*, 49 N. W. R., 69.

1274. What taxable.

Where lands were granted to a railroad company on certain conditions, *held*, that upon the performance of the conditions the land became taxable, although not yet certified or patented to the company: *Whitehead v. Plummer*, 76–181.

A party who acquires a right to possession of property belonging to a city is to be regarded as the owner, and liable for the taxes thereof: *Muscatine v. Chicago, R. I. & P. R. Co.*, 79–645.

1275. Credits.

The term "credits" as here used includes shares of corporate stock: *First National Bank v. City Council of Albia*, 52 N. W. R., 333.

1288. Listing.

Where the wife of a naval officer whose husband was absent from the state left the state to join him without intention of returning, still owning the home in which they had resided and some furniture therein, *held*, that she was not a resident of the state so as to be subject to taxation: *Remey v. Board of Equalization*, 80–470.

Where water-works were erected upon premises outside of the city, leased for use as long as needed for the purpose, *held*, that the entire plant, together with the mains, pipes, etc., was assessable as real property in the township in which the main works were located: *Oskaloosa Water Co. v. Board of Equalization*, 51 N. W. R., 18.

1289. Corporate stock.

Stock in a national bank should be assessed at its market value, whether that be above, below, or at par: *First Nat. Bank v. City Council of Albia*, 52 N. W. R., 333.

1289a. Assessment of bank stock. 23 G. A., ch. 39. All shares of the capital stock of banking associations organized under the general incorporation laws of this state known as state or commercial banks, shall be assessed to such banks in the city or town wherein located, and not to the individual shareholders.

The provisions of this statute do not affect the question as to whether, in assessing shares of stock to a stockholder, he may deduct debts therefrom: *First Nat. Bank v. City Council of Albia*, 52 N. W. R., 333.

1291. Deducting debts.

In view of the definition of "credit" found in § 1275, stock in a national bank is to be deemed credits, from which the debts of the holder are to be deducted for the purposes of assessment: *First Nat. Bank v. City Council of Albia*, 52 N. W. R., 333.

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1297. National banks.

In view of the provisions of § 1291, authorizing the deduction of debts from moneys and credits in determining the amount of assessable property, a stockholder in a national bank is entitled to have deducted from the value of his stock the amount of his debts: *First Nat. Bank v. City Council of Albia*, 52 N. W. R., 888.

Where a portion of the capital stock of a national bank is invested in land which is subject to taxation, the bank is to be taxed upon the actual value of its stock, diminished by the proportionate value of the real estate owned by the bank: *Ibid.*

1300. Classification.

The board of supervisors cannot, acting as a board of equalization, so change assessments that money and credits in all the townships shall be taxed at their face value, while other property is taxed at only fifty per cent. of its value: *Manson Loan & Trust Co. v. Heston*, 49 N. W. R., 985.

1301. Misdescription.

Under the circumstances of a particular case, *held*, that the description of property in the assessment of a special tax thereon was sufficient: *Muscatine v. Chicago, R. I. & P. R. Co.*, 79–645.

As to sufficiency of description in general, see notes to § 1380.

1308a. Assessor to collect statistics. 24 G. A., ch. 57, § 1. It shall be the duty of each township, town or city assessor, at the time for taking lists of property for taxation, in each odd numbered year or when the real estate is assessed, to require each person whose property is listed to make answers to such inquiries as may be necessary to secure reliable statistics of the previous year, as follows, to wit: Number of acres and number of bushels per acre of winter wheat, spring wheat, corn, oats, barley, rye, buckwheat, beans, flax seed, timothy seed, clover seed, Irish potatoes, sweet potatoes; number of acres and number of gallons per acre of sorghum; number of acres and number of tons per acre of broom corn, timothy, clover, Hungarian, millet and prairie hay; number of acres of pasture, artificial and natural groves or forests, nurseries, orchards, vineyards, small fruits and vegetables; number of bushels of orchard products and small fruits; number of pounds of grapes; number of horses, mules, cattle, sheep and swine, subdivided into the classes or breeds to which they belong; also the number of stands of bees, native and Italian, and the number of pounds of honey produced.

The assessor shall record these statistics upon the blanks furnished them for that purpose, as hereinafter provided, and shall make a return thereof to the auditors of their respective counties on or before the third Monday in May of such year.

1308b. Blanks furnished. 24 G. A., ch. 57, § 2. It shall be the duty of each county auditor to deliver to the assessors of his county the necessary blanks for recording the aforesaid statistics, and within thirty days after the assessors' returns are received by him he shall make out and forward to the auditor of state a tabulated statement thereof by townships.

1308c. State auditor to provide. 24 G. A., ch. 57, § 3. It shall be the duty of the auditor of state to provide and cause to be delivered to the county auditors, the first week in January of such year, the blanks that may be necessary to carry into effect the provisions of this act; and he shall issue warrants upon the general fund for the cost of the same, upon the order of the executive council.

1311. Raising assessments.

Where a board of equalization at their first meeting raised an assessment from fifteen dollars to fifty-three hundred and thirty-four dollars and entered the assessment as changed upon the records, and afterwards posted the notice of the change in the assessments, with time and place of hearing objections to the same, *held*, that as the entry upon the records at the first meeting was not designed to prevent plaintiff from having a hearing before final action was taken, and at best was a mere irregularity, not affecting a substantial right, it should not be allowed to avoid the proceeding: *Rockafellow v. Board of Equalization*, 77–493.

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Where the assessor decided to list certain bank stock of plaintiff for taxation, and it was agreed between him and the plaintiff that the question as to whether it should be taxed should be submitted by the assessor to the board of equalization, and such board thereupon included the stock in plaintiff's assessment, *held*, that the case was not one of raising the assessment in such sense that plaintiff was entitled to notice: *Jackson v. Chizum*, 78–209; *Keihl v. Chizum*, 78–213.

1312. Appeal.

Where plaintiff was assessed a certain sum, by the town council, upon merchandise, and appealed from the assesement on the ground that he had no goods and merchandise, and it appeared that he had sold his merchandise, *held*, that the court was not authorized to change the assessment from merchandise to moneys and credits, and could not try any other issue than that presented by the appeal: *Brown v. Grand Junction*, 75–488.

Where the board assessed for taxation a person who was not a resident of the state, *held*, that it acted without jurisdiction and that *certiorari* was the proper method of review: *Remey v. Board of Equalization*, 80–470.

Where a corporation was assessed by the assessor, with its consent, in the sum of $1,000 on moneys and credits, and subsequently the assessment was raised by the board, but on application to them, and on appeal to the district court it was finally reduced to that amount, *held*, that the corporation could not object, on appeal to the supreme court, that such assessment was not proper: *Phelps Mfg. Co. v. Board of Equalization*, 51 N. W. R., 50.

An appeal to the supreme court from the district court in a proceeding to review the action of the board of equalization is triable *de novo: First Nat. Bank v. City Council of Albia*, 52 N. W. R., 333.

1313. County equalization.

The board of supervisors has not the authority to change assessments of moneys and credits so that such moneys and credits shall be taxed at their full value, while other property is assessed at fifty per cent. of its value: *Manson Land & Trust Co. v. Heston*, 49 N. W. R., 985.

Action of the board once taken should not subsequently be rescinded by it by way of expunging from the records its resolution, without hearing from the parties interested, and upon the mere individual recollection of the members of the board: *Ridley v. Doughty*, 52 N. W. R., 350.

1317. Entry by auditor of change.

Where the board of equalization reduces the valuation of property, it is the duty of the auditor to enter in the tax list the valuation upon which the tax is estimated and collected, and upon his failure or neglect to do so, the owners of the property have a remedy by *mandamus: Ridley v. Doughty*, 77–220.

1322. Correction.

The authority given to the auditor to correct the tax books may be exercised after the books have passed into the hands of the treasurer: *Ridley v. Doughty*, 52 N. W. R., 350.

1326. Bringing forward.

The corresponding provisions of the Revision of 1860 did not make invalid a sale of property in whole or in part for a tax not brought forward on the tax books. At least as to the owner himself, such a sale was valid: *Hunt v. Gray*, 76–268.

But by an amendment made in the law by this section of the Code the rule in this respect was changed, and under the statute as it now stands there can be no valid sale of real estate for delinquent taxes which have not been brought forward on the tax lists: *Ibid.; Sac County v. Hooper*, 77–435.

But such change of the law did not affect sales made under a previous statute, nor deeds in pursuance of them: *Hunt v. Gray*, 76–268.

Although the statute declares a sale for taxes for past years not thus carried forward invalid, yet it is not thereby intended to render the sale void. It is voidable only, and the limitation of five years provided for by § 1388 is applicable to an action questioning the validity of a deed made at such sale: *Griffin v. Bruce*, 73–126; *Collins v. Valleau*, 79–626; *Lawrence v. Hornick*, 81–193.

But failure to carry forward a delinquent tax will not make the sale invalid when the tax book was not in the hands of the treasurer before the sale: *Babcock v. Bonebrake*, 77–710.

1334. Duty of owner.

If the real owner stands by, knowing that another is asserting rights to the property, such as seeing that the property is listed in his name, and paying the taxes thereon, he is estopped from maintaining ejectment for the land: *Conklin v. Wehrman*, 38 Fed. R., 874.

1335. When liens. 853; 21 G. A., ch. 133; 24 G. A., ch. 35. All taxes upon real estate shall, as between vendor and purchaser, become a lien upon such real estate on and after the thirty-first day of December in each year. And when a merchant or other person assessed with personal property only,

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shall sell or transfer in bulk any stock of goods or merchandise, after the taxes thereon have become payable and remaining unpaid all such unpaid taxes shall become a lien upon such personal property in the possession or under the control of such purchaser or vendee; and when any such transfer occurs after the assessment and before any such tax becomes due and can be paid, the auditor shall, upon notice being given to him, change the name as to the owner, and any such tax shall be collectible against such owner, purchaser or vendee, the same as if such personal property had been assessed in his or her name. [9 G. A., ch. 110.]

[As amended by the addition of the last sentence.]

CHAPTER 2.

COLLECTION OF TAXES.

1341. Collection by sale of personal property.

Where the treasurer had commenced to enforce the payment of taxes by distress of personal property of the tax-payer, and had discontinued such proceedings on the promise of one who was about to purchase said property, that he would become personally responsible therefor, *held*, that such promise was not binding, as the inducement thereto was the abandonment by the officer of the discharge of his legal duty: *Cass County v. Beck*, 76–487.

1347. Payment; lien; recovery.

Tax-payers are authorized to rely upon the county treasurer for the proper application of money given him for the payment of taxes, and they will not be allowed to lose their property through the mistake of such officer in a misapplication of payment: *Henderson v. Robinson*, 76–603.

Before the enactment of the provisions of § 1326 as to bringing forward delinquent taxes on the tax lists, a sale for such taxes without their being brought forward was valid, at least as against the owner, the taxes being a perpetual lien: *Hunt v. Gray*, 76–268.

Personal property taxes are a lien upon mortgaged real estate, although the latter has been sold under foreclosure of the mortgage and the tax-payer's interest at the time the taxes became due is only the right of redemption: *New Eng. Loan & Trust Co. v. Young*, 81–732.

The case of *Goodnow v. Stryker*, 61 Iowa, 261, as to recovery of taxes paid, is adhered to under the rule of *stare decisis*, although some of the members of the court think that case was incorrectly decided: *Goodnow v. Wells*, 76–774; *S. C.*, 78–760.

Where it appeared that at the time when taxes were paid by the plaintiff on premises subsequently decreed to belong to defendant, there was a controversy between plaintiff and defendant as to the title, which was only settled by such decree, *held*, that plaintiff might, in an action brought within five years after the rendition of such decree, recover the taxes paid by him on the premises, which defendant would have been required to pay under the title as claimed by him: *Wood v. Curran*, 76–550.

In an action to quiet title against one who claimed title under a judicial sale, which was adjudged to be void, and who had paid taxes under such claim, *held*, that she was entitled to recover the taxes with six per cent. interest from the time of the respective payments, and that the same should be a lien on the land: *Cassidy v. Woodward*, 77–354.

Where a non-resident claiming ownership paid taxes on the land, which was not inclosed, and the only assertion of adverse title was that made by cutting hay and stacking it upon the land, and such other acts of dominion over it as it was susceptible of in its wild state, *held*, that the non-resident claimant whose title was afterwards declared invalid by reason of a defect in the title of his grantor could recover the taxes paid by him from the one who was found to be the rightful owner of the land: *Merrill v. Tobin*, 82–529.

Also *held*, that a grantee taking premises with full knowledge of all the facts in connection with the payment of taxes, it not appearing that any of the intervening grantors were innocent purchasers, took subject to the obligation to pay such taxes, and they should be made a lien upon the land: *Ibid.*

Where swamp lands were improperly listed for taxation, and taxes were paid thereon, *held*, that a subsequent purchaser of such land from the county, asserting his title thereto as against a prior invalid grant, was not bound to refund to the adverse claimant taxes paid by the latter during the time when the land was subject to taxation: *Hays v. McCormick*, 49 N. W. R., 69.

The right of the person paying taxes on land which is afterwards adjudged not to belong to him, to have such taxes refunded and to a lien on the land therefor, is not a right passing with the land, so that the grantee of the person paying such taxes can establish a

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lien therefor upon the land against the purchaser in good faith from the real owner: *Brown v. Poole*, 52 N. W. R., 349.

Where the payment of taxes is pleaded by defendant as a matter in defense of plaintiff's right to have his title quieted, and no affirmative relief is asked, the court will not give defendant judgment for such taxes, but leave the right thereto to be determined in another proceeding: *American Emigrant Co. v. Fuller*, 50 N. W. R., 48.

1349. Receipt.

In an action to set aside a tax sale and deed on the ground that the plaintiff had paid the taxes for which the land was sold, before the sale, and where, in support of his claim, he offered a tax receipt showing the payment of the taxes upon the lot in question with a number of other lots, *held*, that the evidence was sufficient to show the payment of the taxes, although the stub of the tax receipt failed to show either the description of the lot or the payment of the taxes: *Bright v. Slocum*, 77–27.

1352. Refunding.

The liability of the county for taxes illegally paid does not depend upon whether or not the money that has been collected has been paid out: *Eyerly v. Supervisors of Jasper County*, 77–470.

But this section has no application in cases where the tax is held as a trust fund for the benefit of a railroad and the money has been paid over: *Ibid.*

The board of supervisors can order the refunding of taxes only by the treasurer in office, not by a treasurer who has gone out of office. So *held* with reference to railroad-aid taxes: *Eyerly v. Board of Supervisors*, 81–189.

1353. Sale.

The treasurer of a newly organized county has no authority to collect taxes which were delinquent before the organization of the county, and has no power to sell the land for such delinquent taxes: *Collins v. Storm*, 75–36.

As to sufficiency of description of property sold, see notes to § 1380.

1358. Purchase; bid; description.

In an action to quiet a patent title as against a tax title, where plaintiff claimed that the tax title was invalid because the defendants claimed to own the land, and the money paid at tax sale was in effect only a payment of taxes, *held*, that it was not shown that defendants were the owners of the land prior to the execution of the tax deed; but if it were conceded that they were the owners, plaintiff must fail because he obtained his interest, with notice of defendant's title: *Griffin v. Turner*, 75–250.

Where the tax-sale record showed that certain bids upon land sold for taxes were for fractions of the tracts, *held*, that the law would regard them as undivided interests, although from the list of lands advertised for sale it appeared that the bids were for acres and fractional parts of acres: *Jenswold v. Doran*, 77–692.

As to sufficiency of description, see notes to § 1380.

1370. Fraud.

The word "void" under this section means "voidable," and the provisions of § 1388 with reference to the limitation of actions attacking such deeds are applicable to an action attacking a deed on this ground: *Lawrence v. Hornick*, 81–193; *Waggoner v. Mann*, 48 N. W. R., 1065.

1373. Assignment of certificate.

Where at the time a certificate was assigned there appeared indorsed thereon an agreement not to sell or transfer it, nor procure a treasurer's deed under it, the assignor having already sold and conveyed the same premises by warranty deed, *held*, that the title under such conveyance was superior to that acquired by a tax deed taken by the assignee of the certificate: *Soukup v. Union Inv. Co.*, 51 N. W. R., 167.

1375. Redemption.

Where the owner applying to the auditor to redeem paid the amount stated by the officer to be necessary, *held*, that such redemption was effectual although the amount was by mistake of the officer less than required, and the redemptioner refused on subsequent application to pay the balance: *Hintrager v. Mahoney*, 78–537.

Where the holder of a tax certificate advised the owner as to the amount necessary to redeem, and received that amount from the owner, *held*, that his rights under the certificate would thereby terminate, and no valid tax title could be acquired by him or his assignees: *Hunt v. Seymour*, 76–751.

Where a similar provision was found in the charter of a city, *held*, that no right of action accrued against the auditor until he received the money under the arrangement for redemption, and that the fact that such money was received from a predecessor in office would not allow him to interpose the bar of the statute of limitations by reason of an action not having been brought against such predecessor: *Hintrager v. Richter*, 52 N. W. R., 188.

And in such case, *held*, that the city might enter into a compromise with the tax-payer for the redemption of his property, and that such compromise would be binding: *Ibid.*

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1376. Certificate of redemption.

A payment made under contract for conveyance of property will entitle the grantee to redeem from a tax sale thereof: *Lynn v. Morse*, 76–665.

A mere volunteer making payment in an attempt to redeem from a tax sale in which he has no interest is not entitled to recover from the owner of the land the amount paid: *Ellsworth v. Randall*, 78–141.

Where a certificate of redemption was issued by a person assuming to act as deputy but whose authority was not otherwise shown, and it appeared that such certificate was received by the land-owner from an agent of his authorized to make redemption, and who charged him with the amount paid therefor, the payment not being shown, however, by the proper record, *held*, that the fact of redemption was sufficiently shown to defeat the tax title: *Burke v. Cutler*, 78–299.

And in such case, *held*, that under the circumstances there had not been such laches in asserting the owner's right to the property as to defeat his action to have his title quieted against the holder of the tax title: *Ibid.*

The law authorizing redemption is to be liberally construed in favor of the land-owner, and after payment of the money for redemption misconduct and neglect of public officers will not be allowed to divest the owner of his property: *Ibid.*

1377. Redemption by minor.

A minor cannot take advantage of the provisions of this section unless it appears that he was the owner of the property at the time of the sale: *Pearsons v. American Investment Co.*, 49 N. W. R., 853.

The simple production, from the custody of the guardian of a minor who is a near relative, of an unacknowledged conveyance to such minor, does not make out a *prima facie* case of ownership in the minor, entitling him to redeem from tax sale after attaining his majority. The burden of proof is upon the minor to show that he is the actual owner of the premises at the date of sale: *Harding v. Vaughn*, 36 Fed. R., 742.

1378. Equitable redemption.

Equitable action to redeem, on the grounds of insufficient notice and service, may be maintained under this section. The fact that other relief is asked in regard to the land will not take the case out of these provisions. Such an action cannot properly be brought under the statutory provisions with reference to quieting title, and therefore § 4498, with reference to new trials in actions to quiet title, under which no notice of motion for new trial is required, is not applicable to a motion for new trial in a case brought under this section, and notice of such motion must be given: *Callanan v. Lewis*, 79–452.

A tax-payer is authorized to rely upon the treasurer for the correct application of the money sent to him to pay taxes, and his failure to pay taxes and to make such application is ground upon which the tax-payer may redeem from the tax sale for such delinquent taxes: *Henderson v. Robinson*, 76–603.

Where the money necessary to redeem from a tax sale was paid to the holder of a tax certificate, on condition that the latter would procure a tax deed and transfer the title to the owner of the land, *held*, that such payment would be regarded in equity as a redemption, though not made in the manner or at the time prescribed by statute: *Leas v. Garverich*, 77–275.

Where notice of expiration of period for redemption was properly given and deed was issued and possession was taken thereunder, but the proof of service was defective, and the rental value up to the time sufficient proof of service was made and a new deed issued was sufficient to satisfy the taxes, *held*, that the receipt of such rents did not amount to an equitable redemption, especially in view of the fact that the rental value was largely due to improvements made by the occupant: *Babcock v. Bonebrake*, 77–710.

Where by reason of insufficiency in the notice the time for redemption does not expire, the persons claiming to be owners of the land, or mortgagees thereof, may make redemption: *Griffith v. Utley*, 76–292.

The right of equitable redemption *held* not to be cut off by service of notice of the time of redemption and failure to pay the amount necessary to redeem, where the owner had been continuously asserting the right to make equitable redemption, and had tendered to the holder of the certificate the amount to which he was entitled: *Lynn v. Morse*, 76–665.

In an action to quiet title, where the tax deed under which defendant claimed was declared void, *held*, that judgment should be entered quieting title in plaintiff upon payment of the amount paid by defendant for taxes and six per cent. interest; but the question as to improvements should be adjudicated in a subsequent action, as the case falls within the statute in regard to occupying claimants, and is not governed by this section: *Collins v. Storm*, 75–36.

Where a sale was void for uncertainty, the bid being for the undivided eighteen acres of the tract offered, *held*, that the purchaser was not entitled to recover anything from the owner of the land, seeking to set aside such sale, the owner not being the person against whom the tax was assessed, but a subsequent purchaser of the property, not personally bound to pay such tax: *Smith v. Blackiston*, 82–240.

A guardian purchasing property of his ward at tax sale cannot, by transfer of such certificate, enable the transferee to acquire the title adversely to the ward: *Dohms v. Mann*, 76–723.

An attorney acquiring by assignment a tax certificate at the time when he was giving his client information with reference to the taxes to be paid on the land, and not advising him

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as to the sale, *held* to be the trustee as to the title acquired by such assignment, so that the owner of the land could redeem from a deed issued in pursuance of such certificate, even as against the grantees of the attorney: *Lynn v. Morse*, 76–665.

Where one of two or more tenants in common under a tax title is trustee of the legal title for the real owners, so that he cannot hold the tax title against such owners, his cotenants are equally incapacitated from asserting such tax title: *Soreson v. Davis*, 49 N. W. R., 1004.

A co-tenant who would be incapacitated originally from taking a tax title cannot afterwards purchase a tax title to the prejudice of his co-tenants: *Ibid.*

A party who had held the legal title to premises, but whose title had been declared invalid, and who had executed a quitclaim deed, *held* not thereafter debarred from acquiring a tax title to such premises: *Seymour v. Harrison*, 52 N. W. R., 114.

Where the owner of land concealed his interest for twenty-eight years, and failed to pay the taxes and redeem the land from tax sale because he did not deem it of sufficient value to justify the expense, and others had expended money in acquiring title and improving the land, *held*, that he would be estopped by his own conduct from questioning the sufficiency of the tax deeds by which others had acquired title to the land: *Baird v. Ellsworth*, 81–629.

An action which does not question the validity of the sale and deed, but attacks the right of the person claiming thereunder to acquire title thereby, is not barred by the provisions of § 1388: *Soreson v. Davis*, 49 N. W. R., 1004.

As to the requirement that a party attacking a tax deed must show title, and the payment of taxes upon the property, see § 1382 and notes.

1379. Redemption; notice.

The requirement of this section in regard to service of notice upon the party in possession is absolute, and where notice was served personally upon the owner, but was not served on the person in actual possession, *held*, that a deed made in pursuance of such notice was absolutely void: *Bradley v. Bunn*, 75–180.

Notice of the expiration of time of redemption must be served upon the party in actual possession of the land, whether the possession is rightful or not; and where there were no buildings on the land, and the only evidence of occupancy or possession was a growing crop of corn, *held*, that this was evidence of a satisfactory kind, and sufficient to entitle the person raising the crop to notice: *Callanan v. Raymond*, 75–307.

If there is no person in possession of the land sold, and it is not taxed in the name of any person, no notice is required: *Brown v. Pool*, 81–455.

But where one is in possession, notice must be served upon him without regard to whether he is rightfully in possession or not: *Ibid.*

Where a party herded cattle upon and over a range of uncultivated land, including the land in question, without any claim of right to do so, *held*, that his possession was not such as entitled him to notice: *Ibid.*

If the land is taxed to an unknown owner notice is not required. The fact that a blanket notice, which would be insufficient if notice were required, is served, will not defeat the sale: *Lawrence v. Hornick*, 81–193.

Where land was taxed to an unknown owner and the holder of a tax certificate had paid subsequent taxes and the treasurer had entered his name in the column marked "names of owners," merely as a matter of convenience, *held*, that the fact of his name being placed in such column would not justify the inference that the land had been taxed to him: *Irwin v. Burdick*, 79–69; *Irwin v. Dakin*, 79–72.

Where it was claimed that a tax deed was fraudulent because the notice was fraudulently served on a person who was not the owner, *held*, that notice being properly served on the person in possession, the other notice was immaterial, and the deed was valid: *Clifton Heights Land Co. v. Randell*, 82–89.

The statute does not require the service of a notice to redeem upon the person who will at the proper time be entitled to receive the deed: *Knight v. Campbell*, 76–730; *Brown v. Pool*, 81–455; *Seymour v. Harrison*, 52 N. W. R., 114.

Though land is taxed by mistake in the wrong name, the notice is to be given to the person in whose name it is taxed: *Seymour v. Harrison*, 52 N. W. R., 114.

The provision for serving notice by publication is permissive, and personal service in lieu of such publication is sufficient: *Ibid.*

There is nothing in the statute requiring the service of notice on the owner of the land, unless it is taxed in his name: *Ibid.*

The tax deed being *prima facie* evidence of the regularity of all proceedings prior to its execution, it must be presumed in the absence of a showing to the contrary that the notice was served upon the person in whose name the land was taxed: *Soukup v. Union Inv. Co.*, 51 N. W. R., 167.

The word "notice" used in this section means a written paper containing the statements or recitals necessary to inform the person notified of the facts required to be communicated or declared to him. It should be addressed to the person to be served, or his name in some manner should appear therein: *Steele v. Murray*, 80–336.

Where the description of the premises in the notice was that of an undivided portion of a tract, *held*, that the notice was insufficient for want of certainty, and the right to redeem was not thereby cut off: *Griffith v. Utley*, 76–292.

Further as to sufficiency of description, see notes to § 1380.

Where the notice of the expiration of the time for redemption covered more than one sale of more than one tract, but was single as to the party who purchased the lands, and the person to whom they were taxed, *held*, that the notice was sufficient: *Jenswold v. Doran*, 77–692.

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Where the land was listed in the treasurer's office for the taxes of 1884 in the name of N. F. C., while for the taxes for 1885 it was listed by the assessor in the name of M. F. C., and the notice of the expiration of the time for redemption was published in July, 1885, and was directed to N. H. C., *held*, that such notice should have been directed to M. F. C., and was not sufficient: *Lynn v. Morse*, 76–665.

A name written by the auditor in the assessor's book in June, opposite the description of the land, *held* not to constitute a correction of the name of the owner, even if the auditor had power to make such correction, as it was not placed in the column for owners' names: *Ibid.*

Where the purchaser of land at a tax sale gave proper notice of the expiration of the time for redemption, but failed to file sufficient proof of such notice in the treasurer's office, but a tax deed was issued by the treasurer; and where, more than four years after the tax deed was issued, the purchaser filed a second proof of service, and received new deeds from the treasurer, *held*, that the purchaser never having assigned his certificate was the proper person to file the second proof of the service of notice, although he had previously conveyed the land: *Babcock v. Bonebrake*, 77–710.

Where the publisher of the newspaper in which the notice is published makes an affidavit of publication, and the owner of the certificate makes affidavit in which reference is made to the notice and affidavit of the publisher, all of the papers may be considered together in determining whether the proof of service is sufficient; and where the affidavit made by the holder of the certificate was on a separate sheet of paper attached to the affidavit of the publisher on which was pasted a slip containing a description of the premises and referred to such notice, *held*, that it was sufficient: *Smith v. Heath*, 80–231.

Where the affidavit of proof of service of the notice was not complete by reason of lacking the signature of the affiant, *held*, that the filing of new proof of service, and the expiration of the ninety days thereafter, without payment by the owner, of the amount required to redeem, did not cut off the rights of such owner, where it appeared that the owner had an equitable right to redeem, which he had been continuously asserting: *Lynn v. Morse*, 76–665.

In ordinary cases mere lapse of time may not estop the owner of land from asserting his title against a tax deed issued upon insufficient notice; but where the owner for twenty-eight years concealed his interest in the land and stood silently by and allowed others to pay the taxes and expend money and labor in acquiring title and improving the land, *held*, that he was estopped by his own conduct from questioning the sufficiency of the tax deed: *Baird v. Ellsworth*, 81–629.

1380. Tax deed.

Description: Where a tax deed contained the following description of the land it attempted to convey: "The west fract. 1-2 quarter of the N. W. quarter of section 7, in township 96 north, of range 41 west," *held*, that the description was so indefinite that no title was conveyed by the deed: *Collins v. Storm*, 75–36.

Where the premises sold were described in the deed as "the undivided thirty-nine and one-half acres of the northeast quarter of the northeast quarter," etc., *held*, that the deed was invalid for uncertainty in the description: *Griffith v. Utley*, 76–292. To same effect, *Ellsworth v. Nelson*, 81–57.

"The undivided 18 acres" of a tract offered for tax sale is not a sufficient description in a tax deed to convey any interest to the purchaser: *Smith v. Blackiston*, 82–240.

Where the description was "west part, northeast quarter northwest quarter, twenty acres," *held*, that it was sufficiently definite: *Soukup v. Union Inv. Co.*, 51 N. W. R., 167.

In a particular case, *held*, that the description was so indefinite that the sale was invalid: *Hintrager v. Nightingale*, 36 Fed. R., 847.

Laches: Where the purchaser of land at tax sale neglects to secure a deed, and the land is subsequently bid in by a purchaser at another sale who takes a deed under such sale. the rights of the first purchaser to a deed having become barred before the second deed is issued, the first purchaser cannot set up any rights under his certificate, to defeat the title of the second purchaser: *Johns v. Griffin*, 76–419.

1382. Effect of deed; who may question.

Conveys what: A title based upon a tax sale and deed is not derivative. It is a breaking up of all titles. When made in conformity with the requirements of the law it is available, not only against the owner of the patent title, but against all liens based upon the patent title: *Bull v. Gilbert*, 79–547; *Willcuts v. Rollins*, 52 N. W. R., 199.

The tax deed conveys to the purchaser the lien of the state and county, and if valid vests in him a new and independent title: *Hefner v. Northwestern Life Ins. Co.*, 123 U. S. 747.

A tax title is not a derivative, but a new and independent title. A right of action for breach of warranty under a deed by which the owner holds the land does not pass to the tax purchaser: *Bellows v. Litchfield*, 48 N. W. R., 1062.

Recovery of taxes paid: Where the holder of a tax title conveyed the land with covenants of warranty, and the title was afterwards found to be invalid, but the holder of the tax title recovered judgment for the taxes paid, *held*, that the payment of the taxes did not give him an interest in the land, and his grantees by reason of the covenants of warranty did not obtain any interest in the money paid by their grantor for taxes, and which was repaid to him in pursuance of the decree: *Pierce v. Herrold*, 75–504; *Hooper v. Sac County Bank*, 72–280.

Where through his own laches a purchaser

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has failed to perfect his title within the requisite time, so that the deed does not convey the property, he cannot recover for taxes paid more than five years before he seeks reimbursement therefor, at least as against one who is not an owner of the property at the time the taxes were levied: *Hintrager v. Nightingale*, 36 Fed. R., 847.

Presumptions: A tax deed is *prima facie* evidence of title in the grantee, and where a vendor had agreed to make good title in his vendee, and introduced in evidence the tax deed to himself to show compliance with such contract, *held*, that the burden of proving any fact defeating such deed was upon defendant: *Hunt v. Gray*, 76–268.

The production of the treasurer's deed properly acknowledged and recorded makes out in favor of the holder a presumptive case that the land was assessed: *Mathews v. Burdick*, 38 Fed. R., 894.

And *held*, that negative evidence consisting of the fact that the assessment books or records for the year were not to be found, would not overcome such presumption: *Ibid.*

It will be presumed in the absence of a showing to the contrary that the notice of redemption was served upon the person in whose name the land was taxed, as required by § 1379: *Soukup v. Union Inv. Co.*, 51 N. W. R., 167.

Who may question: One who has a certificate of purchase at tax sale which he has neglected to convert into a deed within the time allowed for that purpose has not such title that he may question the sufficiency of the tax title of a subsequent purchaser of the same land: *Johns v. Griffin*, 76–419.

In a particular case, *held*, that the title of the person seeking redemption from a tax deed was sufficiently shown to entitle him to attack the deed: *Henderson v. Robinson*, 76–603.

The provisions of this section as to who may question a tax deed apply to formal defects therein as well as otherwise: *Lynn v. Morse*, 76–665.

And under the facts of a particular case, *held*, that plaintiff showed such title in the property as to entitle him to question the sufficiency of defendant's tax deed: *Ibid.*

The provision of this section, that before a party can question a tax title he is required to show that all taxes paid upon the property have been paid by him or the person under whom he claims, does not apply to taxes paid by the tax-sale purchaser: *Ibid.*

Moreover, as the payment of taxes is, then, a material fact, and should be alleged in the petition, it appears that the taxes contemplated are those due when the action to redeem is commenced, and not those which may fall due subsequently: *Ibid.*

But failure to allege payment of all taxes due in the petition is an objection which is waived, if not taken by demurrer or answer: *Ibid.*

Where an owner supposes an adverse tax title on his property to be defective, but has reason to believe that persons claiming under such title have no knowledge of the defect, his silence will estop him from asserting such defect as against the persons claiming under the tax title: *Mathews v. Culbertson*, 50 N. W. R., 201.

The transferee of a tax title cannot demand a decree quieting his title without showing that he is the grantee of the original holder of the tax title: *Krueger v. Walker*, 80–733.

On the other hand a person seeking to attack a tax title must show that he is the owner of the patent title; and where a party appeared to be the grantee of persons claiming to be heirs of the holder of the patent title, without any showing that the holder of the patent title was dead and that the grantors were his heirs, *held*, that the right of the grantee to question the tax title was not sufficiently shown: *Ibid.*

Where plaintiff in an action to quiet title alleges ownership of the premises under a tax deed, and defendant denies generally, the validity of the tax deed is thereby put in issue: *Pitts v. Lewis*, 81–51.

Laches: If the tax purchaser through his own laches permits the statutory period to expire without completing the requisite evidence of his purchase and bringing the necessary suit for possession, he can derive no benefit from his purchase at the tax sale: *Hintrager v. Nightingale*, 36 Fed. R., 847.

Void tax: Under the facts of a particular case, *held*, that taxes for the year for which sales in controversy were made belonged to Woodbury county and not to Sioux county, and consequently sales for such taxes by Sioux county were void and no title passed thereunder: *Hilliard v. Griffin*, 72–331; *Pitts v. Lewis*, 81–51; *Ellsworth v. Nelson*, 81–57.

Fraud: Fraud of the purchaser as referred to in this section does not render the tax title absolutely void, but voidable only, and an attack thereon must be made within the period of limitation fixed by § 1388: *Waggoner v. Mann*, 48 N. W. R., 1065.

1388. Limitation.

Where a conveyance of a tax title is made after the expiration of five years from the recording of the deed the grantee cannot assert the bar of the statute in support of such title, unless his grantors were entitled to rely upon such bar: *Knight v. Campbell*, 76–730.

The object of this section is to set at rest all questions between one claiming under a treasurer's deed and those who dispute his right thereunder. It has no application as to a stranger to the title, who during the period of limitation enters into possession of the property; but as against such a party, the right of action for the recovery of the property continues until barred by the general statute of limitations: *Ibid.*

A tax deed is presumed to be valid in the absence of a showing to the contrary, and the holder is presumed to be in constructive possession of unoccupied land, and until the former owner does something indicating an intention to dispute his title and ownership of the property he has no cause of action against him: *Griffin v. Turner*, 75–250.

Therefore, where defendants claimed title to land by virtue of a tax deed and plaintiffs

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claimed the patent title, but made no claim to the land until two days before the expiration of five years from the recording of the tax deed, when he took possession of the land, *held*, that such entry upon the land was in the nature of a trespass, and defendants were not estopped from asserting their tax title as a defense: *Ibid.*

Where the land sold was unoccupied prairie of which the patent owner took actual possession after the recording of the deed, and an action was brought against him by the owner of the tax deed within five years from the date of its recording, *held*, that the action was not barred, although not brought within five years from the time of the execution of the deed: *Strabala v. Lewis*, 80–510.

There can be no constructive possession where the actual possession is in another. Therefore, where a person who owns an undivided half interest in land, and claims title to the whole, is in actual possession, his possession will not inure to the benefit of the holder of the tax title of the other half, they not being tenants in common: *Willcuts v. Rollins*, 52 N. W. R., 199.

If the owner of the patent title is in the actual adverse possession of the land at the expiration of the five years from the time the tax purchaser had a right to a tax deed, the tax title is barred: *Beedle v. Cowley*, 52 N. W. R., 493.

Where the premises constitute the homestead, the rights of the wife by virtue of the occupancy as a homestead for the period of limitation after the tax-title purchaser becomes entitled to his deed will not be defeated by any act of the husband in leasing the land from the tax purchaser: *Ibid.*

Under the facts of a particular case, *held*, that the possession relied on by plaintiff to defeat defendant's rights under his tax title was sufficient: *Clifton Heights Land Co. v. Randell*, 82–89.

Before a party can claim that the holder of a tax title has forfeited his rights by failure to take possession within five years after the record of his deed or to bring action to recover possession in that time, it must appear that such party is the owner of the land: *Schee v. La Grange*, 78–101.

The statute of limitations under this section begins to run against a purchaser at a tax sale at the time when he might obtain a deed: that is, three years after date of sale; and after five years after the time it begins to run not only is the tax title extinguished but all right dependent upon it: *Innes v. Drexel*, 78–253.

The tax purchaser cannot, by delaying, extend the time allowed by the statute for bringing the suit: *Hintrager v. Nightingale*, 36 Fed. R., 847.

To constitute a commencement of action under this section the notice must be actually served: *Ibid.*

A tax deed issued after redemption from the sale is actually made is void, and the title thereunder is not protected by virtue of the limitation contained in this section: *Burke v. Cutler*, 78–299.

Failure to carry forward taxes renders the sale not void but voidable, and does not operate to arrest the running of the statute: *Lawrence v. Hornick*, 81–193.

Where a tax title has been declared invalid because the delinquent taxes for which the land was sold were not brought forward, the running of time under the statute of limitations will not make the tax title valid, as the rights of the parties were fixed by the former adjudication: *Sac County Bank v. Hooper*, 77–485.

Where the tax title is absolutely void on account of fraud of the officers, or otherwise, the provisions of this section do not apply; but if there is an irregularity rendering the title voidable only, as, for instance, the fraud of the purchaser, this limitation can be pleaded: *Waggoner v. Mann*, 48 N. W. R., 1065.

Any defect in the proof of service of the notice of expiration of redemption is cured by the five years' limitation provided for by this section: *Bull v. Gilbert*, 79–547.

The defense of the limitation of this section is not confined to actions for the recovery of the property, but is available to the holder of the tax title, not only against the owner of the patent title, but against all liens based thereon: *Ibid.*

An action which does not attack the validity of a tax sale and deed, but questions the capacity of a person claiming under such sale and deed to acquire title thereby, is not barred under the provisions of this section: *Soreson v. Davis*, 49 N. W. R., 1004.

CHAPTER 3.

SECURITY OF THE REVENUE.

1397. Defaulting treasurer.

The provision of this section does not apply where a county treasurer fails to pay over or account for taxes collected to aid in the construction of railways. They constitute a special fund to be paid to the treasurer of the railway company, and the county is not liable therefor: *Cedar Rapids, I. F. & N. R. Co. v. Cowan*, 77–535.

1400. Depositing funds.

This section of the Code does not forbid the county treasurer to take other security in addition to the bond, if in his judgment it is demanded: *Richards v. Osceola Bank*, 79–707.

Money deposited under the provisions of this section is not to be deemed a special deposit. The bank becomes the debtor of the treasurer, and the sureties of the treasurer cannot insist on the money deposited being treated as a trust fund: *Cadwell v. King*, 50 N. W. R., 975; *McHenry v. King*, 50 N. W. R., 977.

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TITLE VII.

HIGHWAYS, FERRIES AND BRIDGES.

CHAPTER 1.

ESTABLISHING HIGHWAYS.

1410. Proceedings; dedication.

Where the sole object of a highway was to give the owner of a tract of land a more convenient outlet, he having already access to his premises by a public highway, *held*, that such highway was a private way, and the establishment thereof under the provisions for public highways was unconstitutional: *Richards v. Wolf*, 83–358.

Proof of use in connection with other facts is competent to prove title by dedication: *Duncombe v. Powers*, 75–185.

And *held* that knowledge of the use might be inferred from the use of the road by the public in such manner that a reasonable man would see and learn of it: *Ibid.*

The fact that a party has himself obstructed a highway so as to prevent its use in one direction in which it has fallen into disuse will not estop him from proceeding to abate as a nuisance and recover damages for obstructions placed by others in another portion of the highway which is capable of independent use: *Miller v. Schenck*, 78–372.

Failure of the public to assert any right to land by reason of a claim in regard to a highway for thirty years, and long-continued adverse use and occupation by plaintiff and his grantors in good faith, *held* sufficient to estop the public from asserting any right to such land as a highway: *Smith v. Gorrell*, 81–218.

Where a strip of land was recognized by the land-owner as a highway, by constructing bars at each end thereof for the use of the public, and by abstaining from cultivating the same, and was used for that purpose by the public without objection, *held*, that although it thus remained inclosed, the owner could not claim rights therein adversely to the public by reason of his possession: *Hempsted v. Huffman*, 51 N. W. R., 17.

Where a survey has been accepted by the parties and the public as correct, and the highway used in accordance therewith for ten years, the lines of such survey will be recognized as binding: *Crismon v. Deck*, 51 N. W. R., 55.

Where a highway had been used for more than twenty years and had been generally believed to be upon a certain line, though not upon that line, *held*, that the claim of the public was confined to the true line, and as the use must correspond to the claim of right, the public had gained no title by prescription: *Bolton v. McShane*, 79–26.

Under particular circumstances, *held*, that the fact that a road on the line, claimed by defendant to be the line of the public highway, was worked and traveled by the defendant for twenty-five years without objection on the part of the plaintiff, and the further fact that plaintiff built and so maintained his fences as to indicate an intention not to claim any of the land so used as against the public, raised a strong presumption in favor of defendant's claim, which was not overcome by the evidence; and *held* that, even had no steps been taken to establish a highway on the land in question in the manner provided by law, the court would be justified in finding that it had been established by the acts of the plaintiff and of the public, and by the lapse of time: *Sherman v. Hastings*, 81–372.

In a particular case, *held*, that the evidence did not show a sufficient adverse user of the land in question to authorize a finding that the public had acquired a right to the same as a public highway: *Ladd v. Osborne*, 79–93.

A land-owner who signs the petition and accompanying deed of dedication for the land covered by the highway cannot be heard to say that so much of the road as passes over his land is not duly established where the road has been actually used from the time of such proceedings; and a grantee of such owner is in the same position: *Miller v. Schenck*, 78–372.

Where it appeared that a public highway had been claimed and used adversely to defendant for the statutory period, *held*, that a highway by prescription was thereby shown. *McAllister v. Pickup*, 50 N. W. R., 556.

See, also, as to adverse possession, notes to § 3734.

1426. Notice.

The statute authorizing the establishment of a road upon notice by publication is not in conflict with the constitution: *State v. Chicago, M. & St. P. R. Co.*, 80–536.

There is nothing in the statute requiring the seal of the auditor to the notice to be served by publication, and such seal is therefore not necessary: *Ibid.*

Under § 519 of the Code of 1851, requiring that notice of the presentation of the petition for laying out a highway be posted for four weeks, *held*, that the notice appearing by the

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record, being insufficient, it would not be presumed that there was other notice, but that the proceeding would be deemed invalid: *State v. Waterman*, 79-360.

Under the Code of 1851, *held*, that a notice of presentation of a petition for a highway was fatally defective in failing to specify the time when the application would be made: *Ibid.*

A domestic corporation owning and operating a railway is in notorious occupation of its right of way and is entitled to notice, being deemed a resident of the county through which its line runs. This is true although its ownership of its right of way does not appear on the transfer books: *Chicago, R. I. & P. R. Co. v. Ellithorpe*, 78-415.

A failure to give notice as required by this section renders the action in establishing a highway void, and notice will not be presumed by the establishment of the highway alone: *Ibid.*

Where a railway company does not appear by the transfer books to be the owner of land over which a highway is to be established, no personal notice to such railway is required, whether it be a domestic corporation or a foreign corporation which has filed its articles of incorporation with the secretary of state: *State v. Chicago, M. & St. P. R. Co.*, 80-586.

The provisions in regard to notice for the establishment of a highway have no application to the state: *Snyder v. Foster*, 77-638.

1436. Final action.

The statute does not authorize the board to reconsider its action at a previous meeting establishing a highway; and where a highway had been fully established, and at the second regular meeting of the board thereafter proceedings were taken to change such action, *held*, that such proceedings were invalid, being in the nature of new and independent proceedings taken to vacate a road duly established, and without due notice: *Miller v. Schenck*, 78-372.

Where a highway was vacated upon certain conditions to be complied with, *held*, that it appeared that the board were of the opinion that the public good did not require such vacation, and that their action, in the absence of compliance with the conditions, did not affect the right of the public to treat the road as still existing: *Hayes v. Taylor*, 52 N. W. R., 116.

1449. Appeal.

The provision that notice shall be served on the four persons first named in the petition is mandatory and has no reference to the extent of the interest of the parties in the proposed highway, and a notice upon a less number, or upon others than the four first named, will not give the court jurisdiction: *Finke v. Zeigelmiller*, 77-251.

CHAPTER 2.

WORKING HIGHWAYS.

1464. Authority of trustees.

Township trustees have no authority to borrow money for the improvement of highways, or to make the improvements in one district a charge upon the other districts of the township: *Cass County Bank v. Conrad*, 81-482.

1465. Fund.

Each road district is required to keep up and repair its own roads, except that tools, scrapers, etc., are owned and controlled by the township at large. They are under the control of the township clerk, and he is required to determine at what time or times the supervisors of the several districts shall have the use of them: *Bradley v. Love*, 76-397.

The orders provided for by § 1511 are not payable out of the general fund contemplated by this section. The township trustees have no control over the road fund, except that part of it which may be set apart for general township purposes. The balance is to be expended by the road supervisors: *Ibid.*

An order upon the township clerk signed by the township trustees payable out of the general township fund does not give rise to any personal liability on the part of such trustees, it being manifest from the whole instrument that there was no intention to assume a personal liability: *Willett v. Young*, 82-292.

1472. Expending tax.

Prior to the enactment of this statute no authority was vested in the township trustees to expend any of the road tax excepting that part which constituted the general township fund: *Cass County Bank v. Conrad*, 81-482.

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1496. Disposition of taxes.

The supervisor is the collector of the road tax, and is not required to pay any part of it to the township clerk except the portion set apart as a general fund. The balance must be expended for highway purposes in the road district in which it was levied, and no part of it shall be expended for the benefit of another district: *Bradley v. Love*, 76–397.

Each road district is required to keep up and repair its own roads, except that tools, scrapers, etc., are owned and controlled by the township at large: *Ibid.*

One district cannot be compelled to expend its tax indirectly in another district, and therefore orders issued in pursuance of § 1511 are not payable out of the general fund of the whole township, but only out of the funds of the particular district on account of which they are issued: *Ibid.*

1503. Shade trees.

So long as shade trees do not obstruct the road and prevent its use, they should not be removed against the wishes of the owner: *Crismon v. Deck*, 51 N. W. R., 55.

This section was designed to protect the owner in the use and enjoyment of his property, and prevent interference on the part of the road supervisor; but it is not intended to prevent necessary improvements in the highway, where they can be made without material injury to the adjacent property, even though some inconvenience might result to the owners of such property: *Randall v. Christiansen*, 76–169.

1504. Liability of supervisor.

A highway supervisor, who in constructing a bridge violated the terms of the grant in pursuance of which the original bridge had been constructed, *held* to be affected with notice of the terms of such grant, and liable in damages: *Ague v. Seitsinger*, 52 N. W. R., 228.

1505. Repairs.

Where a township trustee borrowed money with which to repair the highways in his district, *held*, that such transaction was illegal, and the fact that the township used the highways, and thus received and enjoyed the benefits which the use of the money conferred, would not render the township liable: *Cass County Bank v. Conrad*, 81–482.

1507. Removing obstructions.

Where a highway has been laid out but not yet opened, a person has not the right to take the law into his own hands and force his way over the land against the will of the owner; and *held*, that the act of such owner in forcibly opposing a person riding through his land under such circumstances did not constitute an assault: *State v. Stoke*, 80–68.

1509. Canada thistles. 995; 24 G. A., ch. 45, § 1. The supervisor of highways, when notified in writing that any Canada thistles (or *Cnicus Lanceolatus*) are growing upon any vacant or non-resident lands or lots within his district, the owner, agent, or lessee of which is unknown, shall cause the same to be destroyed and make return in writing to the board of supervisors of his county, with a bill for his expenses or charges therefor, which shall be audited and allowed by said board and paid from the county fund; and the amount so paid shall be entered up and levied against the lands or lots on which said thistles have been destroyed, and collected by the county treasurer the same as other taxes and returned to the county fund. [14 G. A., ch. 66.]

[As amended by the insertion of the botanical name in parenthesis. The other section of the act amends § 5422.]

1509a. Trimming hedges. 24 G. A., ch. 40, § 1. From and after the 4th day of July, 1892, the owners of Osage Orange hedge fences shall keep the same trimmed along the public highways and railroads, and not allow them to grow more than five feet high for more than one year at any one time.

1509b. Duty of supervisors. 24 G. A., ch. 40, § 2. And it shall be the duty of the road supervisor, when notified to serve written notice on such owners of Osage Orange hedge fences who have refused or neglected to trim their fences, then if such owners refuse or neglect to trim said fences for a period of two months, then it shall be the duty of the road supervisor at his next annual settlement with the township trustees to return a sum not less than six nor more than twenty cents against the owners of such fence for each rod of such fence lying along the public highway or railroad.

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1509c. Removing trimmings. 24 G. A., ch. 40, § 3. It shall be the duty of the road supervisor when notified to serve a written notice on the owners of Osage Orange hedge fences, to remove the trimmings from the public highways, and if such owners neglect or refuse to remove the same, then it shall be the duty of the road supervisor to use any force at his command and remove or destroy the same, and return the cost of such removal or destruction against the owners of such fence as provided for in section 2 of this act [§ 1509*b*].

1510. Distribution of funds.

The authority conferred by this section relates to the distribution of the general township fund: *Cass County Bank v. Conrad*, 81–482.

1511. Issuing orders.

The orders here authorized are not payable out of the general fund. The holder may use them in payment of road taxes or wait until such time as there are funds on hand belonging to the respective districts, with which they may be paid: *Bradley v. Love*, 76–397.

1514a. Steam engine on highway. 24 G. A., ch. 68, § 1. It shall be the duty of persons in charge of any steam engine being propelled upon the highways of this state wholly or in part by steam power, to stop said engine whenever it is one hundred yards distant from any person or persons going on said highway with horses or other animals until said horses or other animals shall have passed, and sooner in case said horses or other animals become frightened before arriving at said distance. The owner or driver of said engine shall also keep a competent man, not less than fifty or not more than one hundred yards in front of said engine to assist in controlling any horses or other animals being driven or used on said highway until said horses or other animals shall have passed by said engine, and it shall be the duty of said man to use all reasonable care and diligence to prevent the occurrence of any accidents which might result in case said horses or other animals become frightened at said steam engine.

1514b. Bridges reinforced. 24 G. A., ch. 68, § 2. It shall be unlawful for any person to drive a steam engine over any bridge or culvert on any public highway in this state, without using four sound, strong planks, each to be not less than twelve feet long, one foot wide, and two inches thick; two of said planks to be kept continuously under the wheels of said engine while crossing said bridge or culvert.

1514c. Whistle. 24 G. A., ch. 68, § 3. It shall be unlawful for any person to blow the whistle of said engine on the public highway.

1514d. Penalty. 24 G. A., ch. 68, § 4. Any owner of a steam engine who by himself, agent or employee shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall for each offense be fined not less than ten dollars nor more than fifty dollars, to be recovered before any court of competent jurisdiction, and shall also be liable for all damages that may be sustained by persons or property by reason of his failing to comply with the provisions of this act.

CHAPTER 3.

FERRIES AND BRIDGES.

1515. Bridges over navigable waters.

Boards of supervisors have power to provide for the erection of bridges only on public highways where the use of the land has been secured in the manner provided by law, and are not authorized to erect bridges over navigable waters unless such power is expressly conferred by statute: *Snyder v. Foster*, 77–688.

Such power is not now conferred by statute, § 1215 of the Revision not being retained in the Code: *Ibid.*

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TITLE VIII.

OF THE MILITIA.

CHAPTER 1.

[In view of the number of amendments made by 24 G. A., ch. 31, in the existing military code, the whole act is reprinted here as amended.]

1555. Who constitute; exemptions. 18 G. A., ch. 74, § 1. All able-bodied male citizens of the state, between the ages of eighteen and forty-five years, who are not exempted from military duty according to the laws of the United States, shall constitute the military force of this state; *provided*, that all persons who have served in the United States service and have been honorably discharged therefrom, are exempt from duty under the military laws of the state; but nothing herein contained shall be construed to prohibit any person from becoming a member of any military organization, or holding any office in the militia of this state. [Const., art. 6, § 1.]

1556. List returned. 18 G. A., ch. 74, § 2. Assessors in each township are required to make and return to the county auditor of their respective counties, at the time of making the annual assessment, a correct list of persons subject to military duty, which list may be revised and corrected by the board of supervisors, and the county auditor shall, in the month of June in each even-numbered year, or at such other time as the governor may direct, certify to the adjutant-general a true copy of said list, and in each odd-numbered year he shall certify to the number of names on said list.

1557. Governor to call out. 18 G. A., ch. 74, § 3; 24 G. A., ch. 31, § 1. When a requisition shall be made by the president of the United States for troops, the governor, as commander-in-chief, by his proclamation shall order out for service the active militia or national guard of the state, or such portion thereof as may be necessary. If the number is insufficient he shall order out the remainder of the militia, or such portion thereof as may be necessary, designating the same by draft, if a sufficient number shall not volunteer, and may organize the same, and commission officers therefor; and when so ordered out for service, the militia shall be subject to like regulations, and receive from the state like compensation and subsistence, as are prescribed by law for the army of the United States.

1558. When. 18 G. A., ch. 74, § 4. The commander-in-chief shall have power, in case of insurrection, invasion or breaches of the peace, or imminent danger thereof, to order into the service of the state such of its military force as he may deem proper, and under the command of such officers as he shall designate.

1559. Sheriff may call. 18 G. A., ch. 74, § 5. In case of any breach of the peace, tumult, riot, or resistance to process of this state, or imminent danger thereof, it shall be lawful for the sheriff of any county to call for aid upon the commandant of any military force within his county, immediately notifying the governor of such action; and it shall be the duty of the commandant upon whom such call is made, to order out in aid of the civil authorities the military force, or any part thereof, under his command.

1560. Command. 18 G. A., ch. 74, § 6. The command of any force called into service under sections four and five [§§ 1558, 1559] shall devolve

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upon the senior officer of such force, unless otherwise specially ordered by the commander-in-chief.

1561. Compensation. 18 G. A., ch. 74, § 7. The military forces of this state, when in the actual service of the state in time of insurrection, invasion, or immediate danger thereof, shall, during their time of service, be paid, by an appropriation especially made therefor, the following sums each for every day actually on duty: To each general, field and staff officer, four dollars; to every other commissioned officer, two dollars and a half; to every non-commissioned staff officer, two dollars; to every other enlisted man, one dollar and a half.

1562. By county. 18 G. A., ch. 74, § 8. All officers and soldiers, while on duty or assembled therefor pursuant to the order of any sheriff of any county in case of riot, tumult, breach of peace, or whenever called upon to aid the civil authorities, shall receive the same compensation as provided for in section seven [§ 1561], and such compensation shall be audited, allowed, and paid by the supervisors of the county where such service is rendered, and shall be a portion of the county charges of said county, to be levied and raised as other county charges are levied and raised.

1563. Iowa National Guard. 18 G. A., ch. 74, § 9; 24 G. A., ch. 31, § 2. The active militia shall be designated "The Iowa National Guard," and shall be recruited by volunteer enlistments and shall consist of four regiments of infantry, and at the discretion of the commander-in-chief, of two batteries of artillery, and two troops of cavalry, and such other officers and enlisted men as are hereinafter prescribed.

1564. Brigades; enlistments. 18 G. A., ch. 74, § 10; 24 G. A., ch. 31, § 3. The Iowa National Guard shall be organized into not more than two brigades, each to be commanded by a brigadier-general. The commander-in-chief shall assign all regiments, battalions and companies to such brigades as he shall think proper. All enlistments therein shall be for three years, and re-enlistments for one, two or three years as the soldier may elect, and made by signing enlistment papers prescribed by the adjutant-general, and taking the following oath or affirmation, which may be administered by the enlisting officer, to wit: "You do solemnly swear (or affirm) that you will bear true allegiance to, and that you will support the constitution of the United States and the state of Iowa, and that you will serve the state of Iowa faithfully in its military service for the term of three (one or two) years, unless sooner discharged or you cease to become a citizen thereof; that you will obey the orders of the commander-in-chief and such officers as may be placed over you, and the laws governing the military forces of Iowa, so help you God."

1565. Staff of commander-in-chief; adjutant-general. 18 G. A., ch. 74, § 11; 22 G. A., ch. 82, § 43; 24 G. A., ch. 31, § 4. The staff of the commander-in-chief shall consist of an adjutant-general, a quartermaster-general, an inspector-general, a commissary-general, a surgeon-general, a judge advocate general, a general inspector of small arms practice, a chief of engineers, a chief signal officer, an assistant adjutant-general, a military secretary and such other officers as he may think proper to appoint. The adjutant-general shall rank as a major-general. He shall issue and transmit all orders of the commander-in-chief, with reference to the militia or military organizations of the state, and shall keep a record of all officers commissioned by the governor, and of all general and special orders and regulations, and of all such matters as pertain to the organization of the state militia and the duties of an adjutant-general, and except in times of war or public danger, he shall perform the duties of quartermaster-general, as required by law. He shall have charge of the state arsenal and grounds, and shall receive and issue all ordnance stores and camp equipage on the order of the commander-in-

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chief. He may appoint, with the approval of the governor, an ordnance-sergeant, at a salary of not more than $500 per year, who shall under the direction of the adjutant-general, take charge of the state arsenal and grounds, and shall aid and assist him in the discharge of his duties. He shall furnish at the expense of the state, such blanks and forms as shall be approved by the commander-in-chief. He shall also on or before the first day of December next preceding the regular session of the general assembly, and at such other times as the governor shall require make out a full and detailed account of all the transactions of his office, with the expense of the same for the preceding two years, and such other matters as shall be required by the governor. He shall reside at the state capital and shall hold his office during the pleasure of the governor, and shall receive for his services $1,500 per year.

1566. Generals; election and staff of. 18 G. A., ch. 74, § 12; 24 G. A., ch. 31, § 5. The commander of each brigade shall be elected by the officers and enlisted men thereof; and shall hold his office for five years, or until removed by court-martial or resignation. On recommendation of the brigade commander, the governor shall appoint and commission the brigade staff, as follows: Assistant adjutant-general with rank of lieutenant-colonel; surgeon, with rank of lieutenant-colonel; assistant inspector-general, with rank of major; judge advocate, with rank of major; inspector of small arms practice, with rank of major; engineer and signal officer, with rank of major; quartermaster, with rank of captain; commissary, with rank of captain, and two aides-de-camp, with rank of first lieutenant; and such other officers as the commander-in-chief may think proper. The brigade commander of each brigade shall appoint by warrant, countersigned by the assistant adjutant-general, such non-commissioned staff officers as the commander-in-chief may think proper, and may enlist two men to serve as orderlies.

1567. Regiments; officers of. 18 G. A., ch. 74, § 13; 20 G. A., ch. 65, § 2; 24 G. A., ch. 31, § 6. A regiment shall consist of not less than eight nor more than twelve companies. The field officers of each regiment shall be elected by the officers and enlisted men thereof, and shall hold their offices for five years, or until removed by court-martial or resignation. The commander-in-chief shall have the power at any time to change the organization of regiments, battalions or companies, so as to conform more nearly to the organization that now is or may hereafter be prescribed by the United States army. The regimental staff shall be appointed and commissioned by the governor on recommendation of the regimental commander. The regimental staff shall consist of a surgeon, with rank of major; adjutant, with rank of captain; inspector of small arms practice, with rank of captain; assistant surgeon, with rank of captain; chaplain, with rank of captain; quartermaster, with rank of first lieutenant; or such officers as the commander-in-chief may think proper to appoint. The commander of each regiment shall appoint by warrant countersigned by the adjutant, the non-commissioned staff consisting of a sergeant-major, quartermaster sergeant, commissary sergeant, hospital steward, color sergeant, ordnance sergeant, drum major, principal musician, chief trumpeter, or such non-commissioned staff officers as the commander-in-chief may prescribe. The commissions of all staff officers shall expire when the officer nominating them or his successor shall make new nominations for their respective offices, and such nominations shall be confirmed by the commander-in-chief.

1568. Band. 18 G. A., ch. 74, § 14; 24 G. A., ch. 31, § 7. The adjutant-general may cause to be organized and enlisted a band which shall be composed of a chief musician, a drum major, and not more than thirty-six musicians, under the leadership of such chief musician, and shall be under the command of the adjutant-general for such military duty as the commander-

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in-chief may direct. Each regimental commander may cause to be organized and enlisted a band, under the leadership of the principal musician of his command, not to exceed twenty in number who shall be subject to the orders of such leader, and shall be under the command of such regimental commander. The members of such bands shall be subject to the same regulations as are prescribed for other enlisted men.

1569. Company; officers of. 18 G. A., ch. 74, § 15; 24 G. A., ch. 31, § 8. A company shall consist of a captain, a first lieutenant, a second lieutenant, five sergeants, four corporals, two musicians, and not less than forty nor more than sixty-four privates and non-commissioned officers. A company of cavalry or artillery shall have, in addition to these officers, a commissary sergeant, a quartermaster sergeant and a saddler sergeant. Company officers shall be elected by members of the company, and shall hold their offices for five years. All non-commissioned officers of companies on recommendation of their captains shall be appointed by the warrant of the regimental commander, countersigned by the adjutant. All elections of line officers shall be ordered by the regimental commander. All elections of field and general officers shall be ordered by the commander-in-chief. The orders for such elections shall be sent to the commanding officer of the company in which said election is ordered, who shall in turn issue his special order for such election, giving at least six days' notice thereof, posting said order in three public places accessible to the members of his command, and where practicable the same shall be published in one or more newspapers in the county where said company is located. All voting shall be by ballot, and no voting by proxy shall be legal; and a majority of all votes cast shall be necessary to elect. The senior officer present at such election shall preside. The returns of elections, properly attested shall be made promptly within five days from the date of election, to the commanding officer of the regiment who shall promptly forward the result of said election to the brigade commander who shall report the same to the adjutant-general of the state, by whose approval the commander-in-chief will issue commissions accordingly; *provided*, that at the organization of a new company the election shall be conducted under such regulations as the adjutant-general shall prescribe.

1570. By-laws. 18 G. A., ch. 74, § 16. Every company and regiment may make by-laws for its own government not in conflict with this act or general orders or regulations, which shall be binding upon the members.

1571. Term of service. 18 G. A., ch. 74, § 17; 24 G. A., ch. 31, § 9. Every officer and soldier of the Iowa National Guard shall be held to duty for the full term of his commission or enlistment, unless regularly discharged for good and sufficient cause by the commandant of his regiment, approved by the commander-in-chief; *provided* that said term shall in all cases commence from the time such officer or soldier shall have become an active member of any band, company, regiment or brigade organized or commissioned under the laws of this state and now belonging thereto. All persons serving the full term for which they are commissioned or enlisted in the national guard shall on application, be entitled to an honorable discharge, exempting them from military duty except in time of war or public danger.

1572. Discipline. 18 G. A., ch. 74, § 18. The organization, equipment, discipline and military regulations of the Iowa National Guard shall strictly conform to the regulations for the government of the army of the United States, in all cases except as herein otherwise provided, and all orders and regulations governing troops, not in conflict with the constitution of this state and the provisions of this act, shall be binding upon all the members of the Iowa National Guard.

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1573. Exemptions of members and property. 18 G. A., ch. 74, § 19. Every officer and soldier in the Iowa National Guard shall be exempt from jury duty, from head or poll tax of every description, during the term he shall perform military duty. The uniforms, arms and equipments of every member of the state guard shall be exempt from all suits, distresses, executions or sales for debt or payment of taxes. The Iowa National Guard shall, in cases except treason, felony or breach of the peace, be privileged from arrest during their attendance at drills, parades, encampments, and the election of officers, and in going to and returning from the same.

1574. Drills. 18 G. A., ch. 74, § 20. The commandant of each regiment shall order monthly or semi-monthly, day or evening drills, by the companies of his command, and the members thereof shall receive no compensation for their services while attending such drills.

1575. Parades; encampments. 18 G. A., ch. 74, § 21; 20 G. A., ch. 65, § 4; 24 G. A., ch. 31, § 10. The Iowa National Guard may parade for encampment or drill not less than three nor more than ten days annually by company, battalion, regiment or brigade as ordered by the commander-in-chief. And for the time spent in such encampment or drill, the compensation to be paid under such provisions as the commander-in-chief may direct and according to length of continuous service in the Iowa National Guard shall be allowed as follows: To each officer and soldier of less than three years continuous service $1.00 per day; to each officer and soldier of more than three and less than five years continuous service $1.50 per day; to each officer and soldier of more than five years continuous service $2.00 per day. The quartermaster-general shall provide transportation to and from all such parades or encampments. The commissary-general, under the direction of the commander-in-chief shall provide the subsistence for all forces so encamped, such subsistence to conform as near as practicable to the ration prescribed by the general regulations of the army of the United States, and to be issued in kind.

1576. Field day. 18 G. A., ch. 74, § 22. The commanding officer of any encampment may cause those under his command to perform any field or camp duty he shall require, and may put under arrest during such encampment or parade any member of his command who shall disobey a superior officer, or be guilty of disorderly or unmilitary conduct, and any other person who shall trespass on the parade or encampment grounds, or in any way interrupt or molest the orderly discharge of duty by members of his command; and he may prohibit the sale of all spirituous or malt liquors within one mile of such encampment, and enforce such prohibition by force, if necessary; *provided, however*, that nothing herein contained shall be construed to interfere with the regular business of any liquor dealer whose place of business shall be situated within said limits.

1576a. Detail for special duty. 24 G. A., ch. 31, § 11. The commander-in-chief may, whenever the exigencies of the public service require it, detail any officer or soldier for special duty, and expenses and proper compensation therefor may be paid under such provisions as the commander-in-chief may prescribe.

1577. Ammunition. 18 G. A., ch. 74, § 23. For the use of the Iowa National Guard in target practice, the adjutant-general shall issue to each infantry or cavalry company on the requisition of the commanding officer thereof, an amount not exceeding one thousand rounds of fixed ammunition in each year, and for the use of the artillery he shall issue in each year not exceeding fifty pounds of powder to each company.

1578. Stores. 18 G. A., ch. 74, § 24. Upon the organization of any company or regiment of the national guard, on the requisition of its commanding

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officer, and the approval of the governor, the adjutant-general shall issue all necessary ordnance and ordnance stores; *provided, however*, that when any arms or munitions are delivered to any commander, he shall execute and deliver to the adjutant-general a bond, payable to the people of the state of Iowa, in sufficient amount, and with sufficient sureties, to be approved by the governor, conditioned for the proper use of such arms and munitions, and return of the same, when requested by the proper officers, in good order, wear, use and unavoidable loss and damage excepted. All arms shall be kept at the company or regimental armory.

1579. Inspection. 18 G. A., ch. 74, § 25; 24 G. A., ch. 31, § 12. Such inspections and schools of instruction for officers and non-commissioned officers of the Iowa National Guard shall be held as the commander-in-chief may from time to time direct.

1580. Embezzlement of state property. 18 G. A., ch. 74, § 26. Any officer or soldier of the Iowa National Guard knowingly making any false certificate, or false return of state property in his hands, or wilfully neglecting or refusing to apply all money drawn from the state treasury for the purpose named in the requisition therefor, shall be guilty of embezzlement and fraud, and shall be punished in the manner as provided for like offenses in the criminal code of this state.

1581. Uniforms. 18 G. A., ch. 74, § 27; 24 G. A., ch. 31, § 13. The Iowa National Guard shall adopt the uniform of the army of the United States, subject to such modifications as shall be prescribed by the commander-in-chief.

1582. Same. 18 G. A., ch. 74, § 28. The field, staff and line officers of the Iowa National Guard shall provide themselves with the uniform prescribed for officers of the same rank in the United States army within ninety days from the date of commission.

1583. Penalty for failure to return arms, etc. 18 G. A., ch. 74, § 29. Every officer or soldier who shall wilfully neglect to return to the armory of the company, or place in charge of the commanding officer of the company to which he belongs, any arms, uniform or equipment, or portion thereof, belonging to the state, within six days after being notified by said commanding officer to make such return, or to place the same in his charge, shall be fined not more than fifty dollars or imprisoned not more than thirty days.

1584. Penalty for injuring or disposing of same. 18 G. A., ch. 74, § 30. Every person who shall wilfully or wantonly injure or destroy any uniform, arm, equipment, or other military property of the state, and refuse to make good such injury or loss, or who shall sell, dispose of, secrete, or remove the same, with intent to sell or dispose thereof, shall be fined not more than two hundred dollars, or imprisoned not more than six months, or both.

1585. Fines for absence or misconduct; suit for. 18 G. A., ch. 74, § 31. Every soldier absent without leave or sufficient excuse from any parade, drill or encampment, shall be fined two dollars for each day of absence; and for any unsoldierly conduct at drill, parade or encampment he may be fined

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the pleasure of the commander-in-chief, who shall perform the duties of such office in the court-martial held in his district; and no other person shall prosecute or defend in such courts; but, when he shall be unable to attend, from any cause, or shall be disqualified by interest or relationship, the commander-in-chief may designate the judge-advocate of another brigade to act in his place.

1587. Court-martial. 18 G. A., ch. 74, § 33. Commissioned officers, for neglect of duty, disobedience of orders or unsoldierly or ungentlemanly conduct, may be tried by court-martial, provided that no sentence of any court-martial shall affect the life, liberty or property of any citizen of Iowa, according to the regulations provided in like cases in the army of the United States. The commander-in-chief, by order, shall designate the time and place of holding such courts, and the names of officers composing it, consisting of not less than three nor more than six. The senior officer named shall preside, and shall be of superior rank to the officer on trial, when practicable. Witnesses for the prosecution and defense may be summoned to attend by subpœna signed by the judge-advocate. Any witness, duly summoned, who shall fail to appear and testify may be, by warrant of the president of the court, directed to the sheriff or any constable, arrested and treated as in like cases before civil courts. The fees of all witnesses shall be the same as allowed in civil cases, to be taxed with the necessary expenses of the judge-advocate and the court, by the president of the court, and paid by the state treasurer, on the auditor's warrant, to the judge-advocate, who shall pay all expenses of the trial, when received by him.

1588. Sentence. 18 G. A., ch. 74, § 34. The sentences of courts-martial shall be approved or disapproved by the commander-in-chief, who may mitigate or remit any punishment awarded by sentence of court-martial, when such sentence shall have been approved by the brigade commander. The record of all the proceedings and the sentence of a court-martial in every case, with the order approving or disapproving it, shall be deposited in the office of the adjutant-general.

1589. Military board. 18 G. A., ch. 74, § 35; 24 G. A., ch. 31, § 14. An examining board of three or more competent officers appointed by the commander-in-chief shall convene at such times and places as he shall direct, whose duty it shall be to examine the capacity, qualifications, propriety of conduct and efficiency of all commissioned officers, who shall be ordered before it; and upon the report of said board if adverse to such officer, and if approved by the commander-in-chief, the commission of such officer shall be vacated: *provided*, always, that no officer shall be eligible to sit on such board whose rank or promotion would in any way be affected by the proceedings; and two members at least shall be of equal or superior rank with the officer examined; and if any officer shall refuse to report himself when directed before such board the commander-in-chief may, upon the report of such refusal, by his commander declare his commission vacated.

1590. Military organizations. 18 G. A., ch. 74, § 36. It shall not be lawful for any body of men whatever, other than the regularly organized volunteer militia of this state, and the troops of the United States, to associate themselves together as a military company or organization, or to drill on parade within the limits of this state without the license of the governor thereof, which license may at any time be revoked; *provided*, that nothing herein contained shall be so construed as to prevent social or benevolent organizations from wearing swords.

1591. Soldiers to provide uniforms. 18 G. A., ch. 74, § 37. Every soldier of the Iowa National Guard shall provide and keep himself provided with a uniform, according to the rules and regulations prescribed by law, and

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subject to such restrictions, limitations and alterations as the commander-in-chief may direct.

1592. Payment for same. 18 G. A., ch. 74, § 38; 24 G. A., ch. 31, § 15. Uniforms in kind may be issued by the state under such provisions as the commander-in-chief may direct, or, in lieu of uniforms being furnished in kind by the state there shall annually be paid to each officer and soldier having complied with sections twenty-eight [§ 1582] or thirty-seven [§ 1591] the sum of four dollars to be paid under such provisions as the commander-in-chief may direct, but in no event shall the state be liable for the payment of any money in lieu of uniforms, or for any purpose contemplated by this act, unless such payment can be made without exceeding the annual appropriation provided by this act.

1593. To belong to state. 18 G. A., ch. 74, § 99; 24 G. A., ch. 31, § 16. All uniforms and other military property shall belong to the state and be used for military purposes only, and each officer and soldier upon receiving a discharge or otherwise leaving the military service of the state, or upon demand of his commanding officer shall forthwith surrender the said uniforms, together with all other articles of military property that may be in his possession to said commanding officer.

1594. Expenses. 18 G. A., ch. 74, § 40. There shall be allowed annually for postage, stationery and office incidentals to each brigade headquarters, the sum of twenty-five dollars, to each regimental headquarters, the sum of twenty-five dollars, and to each company headquarters the sum of ten dollars.

1595. Same. 18 G. A., ch. 74, § 41; 24 G. A., ch. 31, § 17. There shall be allowed annually to each company and band for armory rent, fuel, lights, and like necessary expenses, the sum of one hundred dollars.

1596. Adjutant-general's office. 18 G. A., ch. 74, § 42. Such clerical assistance shall be employed in the adjutant-general's office, as shall in the opinion of the governor, be actually necessary, and any person so employed, shall receive, for the time they may be actually necessarily on duty, such compensation as the governor may prescribe.

1597. Regulations. 18 G. A., ch. 74, § 43. The commander-in-chief is authorized to make and publish regulations for the government of the Iowa National Guard in accordance with existing laws.

1598. Punishment for military offense. 18 G. A., ch. 74, § 44. Any soldier guilty of a military offense may be put and kept under guard by the commander of a company, regiment or brigade, for a time not extending beyond the term of service for which he is then ordered.

1599. Companies may be disbanded. 18 G. A., ch. 74, § 45; 20 G. A., ch. 65, § 3. The commander-in-chief shall disband any company of the Iowa National Guard when it shall fall below a proper standard of efficiency, and he may order special inspections with a view to disbandment.

1600. Words construed. 18 G. A., ch. 74, § 46; 24 G. A., ch. 31, § 18. In this chapter the word "soldier" shall include musicians and all persons in the national guard or militia when called into service except commissioned officers, and the word "company" shall include battery and troop.

1601. Medical staff. 18 G. A., ch. 74, § 47. The medical staff of the Iowa National Guard shall have charge of that branch of the service under the supervision of the surgeon-general.

1602. Surgeon. 18 G. A., ch. 74, § 48. A surgeon in charge in the field or at a camp of instruction may draw, on requisition, such medical stores and supplies as in his judgment may be needed, and for which he shall account, on forms provided by the quartermaster-general.

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1603. Surgeon-general. 18 G. A., ch. 74, § 49. The surgeon-general may prescribe the necessary forms and blanks for the work of his department; and all subordinate surgeons of the Iowa National Guard will obey his orders, and report, as often as he may prescribe, the transactions of their department.

1604. Term of enlistment. 18 G. A., ch. 74, § 50. Nothing in this act shall be construed to extend the time of any officer beyond the time for which he was elected, or that of any soldier beyond the time for which he was enlisted.

1605. Appropriation. 18 G. A., ch. 74, § 51. There is hereby appropriated the sum of twenty thousand dollars per annum, or so much thereof as may be necessary, out of the state treasury, not otherwise appropriated, for the purposes named in this act. And all warrants against said appropriation necessary to carry out the provisions of this act shall be drawn by the auditor of state upon the state treasurer, upon the certificate of the adjutant-general, approved by the governor. And no indebtedness shall be created under the provisions of this act not covered by the appropriation herein made.

1606. Additional appropriation. 20 G. A., ch. 65, § 5. For the purpose of carrying out the provisions of chapter seventy-four, laws of the Eighteenth General Assembly as herein amended, there is hereby made the additional appropriation of fifteen thousand dollars per annum, or so much thereof as may be necessary, out of any money in the state treasury not otherwise appropriated, and all warrants against said appropriation shall be drawn by the auditor of state upon the state treasurer upon the certificate of the adjutant-general approved by the governor.

1606a. Annual appropriation. 24 G. A., ch. 31, § 19. For the purpose of carrying out the provisions of chapter seventy-four, laws of the Eighteenth General Assembly as amended by chapter sixty-five, laws of the Twentieth General Assembly, and as herein further amended, there is hereby made the additional appropriation of ten thousand dollars per annum or so much thereof as may be necessary out of any money in the state treasury not otherwise appropriated, and all warrants against said appropriation shall be drawn by the auditor of state upon the state treasurer upon the certificate of the adjutant-general approved by the governor.

1607. 18 G. A., ch. 74, § 52. Chapter one hundred and twenty-five, acts of the Seventeenth General Assembly, and all other acts or portions of acts in conflict herewith, are hereby repealed.

1607a. Loan of arms to schools. 24 G. A., ch. 32, § 1. Subject to such restrictions and limitation as the governor may direct, the adjutant-general is authorized to loan the surplus arms and accoutrements belonging to the state to military schools and colleges in good standing located within the state of Iowa which include military drill in their course of instruction: *Provided*, however, that when any arms or accoutrements are delivered to such institutions the proper officers thereof shall execute and deliver to the adjutant-general a bond, payable to the people of the state of Iowa, in sufficient amount and with sufficient sureties to be approved by the governor, conditioned for the proper use of such arms and accoutrements, and return of the same when requested by the proper officer, in good order, wear, and use excepted.

1607b. 24 G. A., ch. 32, § 2. All acts or portions of acts in conflict herewith are hereby repealed.

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TITLE IX.

CORPORATIONS.

CHAPTER 1.

CORPORATIONS FOR PECUNIARY PROFIT.

1610. Recording articles.

Where a corporation failed to record its articles of incorporation as required by statute, and the directors borrowed money in excess of the capital stock, giving their note for the same, which, when the company became insolvent, they paid, in an action by the directors against the other shareholders for an accounting and for contribution of their *pro rata* share of the debt paid by plaintiffs, *held*, that, as between themselves, their contractual relation was to be determined by what they had adopted as their agreement, and therefore, though the articles of incorporation were unrecorded, its provisions were binding upon them; and where one of the articles limited the amount of indebtedness to sixty-five per cent. of the capital stock, the directors who violated this agreement were in no position to demand contribution from the shareholders: *Heard v. Owen*, 79–28.

1611. Limit of indebtedness.

Failure to make in the articles a statement of the highest amount of indebtedness to which the corporation may be subjected is such a failure to comply with the requisites in relation to the organization of the company as to render the stockholders liable under § 1618: *Heuer v. Carmichael*, 82–288.

It is a sufficient compliance with the requirements of this section that the articles provide the limit of indebtedness, except as shall be determined by a majority of the stockholders at a meeting: *Thornton v. Balcom*, 52 N. W. R., 190.

1612. Publication of notice.

Failure to state in the published notice the highest amount of indebtedness for which the corporation may be rendered liable is such a failure to comply with the law in regard to publicity as to render the stockholders liable under the provisions of § 1618: *Heuer v. Carmichael*, 82–288.

Where a notice specified that the indebtedness of the corporation should not exceed a certain sum, while the articles provided that it should not exceed that sum except as authorized by a vote of the majority of the stockholders at a meeting, *held*, that such notice was sufficient: *Thornton v. Balcom*, 52 N. W. R., 190.

1614. Commencing business.

A corporation may lawfully commence business on compliance with the terms of this section. Its authority to do so is not made dependent upon all of its stock being subscribed. *Johnson v. Kessler*, 76–411.

The rights of parties are not made dependent upon the publication of notice required upon the filing of the articles. If the publication is inserted in a newspaper within three months, it seems that it ought not to be held a failure to substantially comply with the statute, though the last publication is not made within that time: *Thornton v. Balcom*, 52 N. W. R., 190.

1618. Liability of stockholders.

Failure to state in the articles and in the published notice the highest amount of indebtedness or liability to which a corporation may be subjected will render the stockholders liable to a creditor under the provisions of this section: *Heuer v. Carmichael*, 82–288.

The fact that a creditor has sought relief against the corporation on his claim will not estop him from recovering against the stockholders under the provisions of this section. These provisions are not limited to cases where the corporation has not a legal existence as such. After recovering a judgment against the corporation the creditor may pursue his remedy as against the stockholders: *Ibid.*

A provision in the articles as to the indebtedness for which the corporation may be made liable excepting "by a majority vote of the stockholders present" at a meeting is a sufficient statement under § 1611, and will not render the stockholders liable under this section: *Thornton v. Balcom*, 52 N. W. R., 190.

Failure to secure subscriptions for stock to the full amount authorized by the articles will

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not render the stockholders liable where there is no requirement in the articles that all the stock shall be subscribed before the company commences business, nor that any definite sum shall be subscribed: *Ibid.*

But such a condition is precedent to the right to commence business and incur debts, unless it is provided in the articles that the corporation may do so when the specified amount of stock is subscribed. The fact that the stock is not all subscribed does not constitute a failure to comply substantially with the requirements in relation to organization and publicity: *Sweeney v. Talcott*, 52 N. W. R., 106.

1621. Liability for fraud.

Where the directors of a mutual benefit association, without authority, merged the same into another association of the same character, it appearing that such directors had a reserve fund and also received money from the other company for such consolidation, *held*, that a certificate-holder in the original company could recover by way of damages from such directors the amount paid in on such certificate, but not the prospective value thereof: *Grayson v. Willoughby*, 78-83.

The fact that officers of an incorporation incur indebtedness in excess of the limit prescribed in the articles or published notice does not constitute such fraud as to render them liable to the persons giving such credit. The officers of the corporation are not agents or trustees of the creditors in such sense as to be answerable to them either for the management of the affairs of the company or the disposition of its property: *Frost Mfg. Co. v. Foster*, 76-535.

The fact that after credit is extended the officers mismanaged the corporate affairs so as to render it insolvent does not make them answerable to the creditors therefor: *Ibid.*

1628. Transfer of stock.

A transfer of stock is not valid as against the levy of an execution until it is regularly entered upon the books of the company: *Moore v. Marshalltown Opera House Co.*, 81-45.

But in a particular case, *held*, that the transfer was sufficient to preclude an execution creditor from afterwards acquiring rights against the assignee, such transfer having been made before the written notice of the levy was served on the officers of the company: *Ibid.*

Where a valid title to corporate stock has been acquired by attachment levied thereon and sale under execution, a transferee whose title does not appear on the books of the company cannot defeat it; but if it appears that the title asserted under the execution sale is not valid, the transfer may be good as between the parties thereto: *Commercial Nat. Bank v. Farmers', etc., Nat. Bank*, 82-192.

As to the method of levying upon corporate stock, see § 4181 and notes.

Where plaintiff agreed to purchase shares of stock in a corporation of a stockholder, and gave his promissory note for the same, and the certificate of stock was placed in the hands of a third party to be delivered to plaintiff when the note was paid, and where it appeared that the note had never been paid or the stock transferred, *held*, that while plaintiff had an interest in the stock, he never owned it, and was not liable to the corporation for unpaid assessments made on account of it: *Connac v. Western White Bronze Co.*, 77-32.

1629. Forfeiture.

Where a railroad company did not commence to build its road for more than two years after its incorporation, and the stockholders did not pay up their subscriptions or take certificates of stock, but during the time the company expended money and made persistent and continuous efforts to procure additional means to construct the road, *held*, that these acts were such an exercise of its franchises as to prevent a forfeiture: *Young v. Webster City & S. W. R. Co.*, 75-140.

1632. Liability for unpaid instalments.

An action against a stockholder, even after the corporation has ceased to exist, need not be brought in equity, but may be brought at law: *Tama Water Power Co. v. Hopkins*, 79-653.

In a particular case, *held*, that although it appeared that stock was issued as fully paid up to a stockholder for property transferred to the corporation, nevertheless as a matter of fact the value of the property was understood to be only one-third of the par value of the stock issued, and that therefore the stockholder was liable to creditors of the corporation for the unpaid balance on his stock: *Boulton Carbon Co. v. Mills*, 78-460.

Where the stockholder has become a creditor of the corporation he cannot set off as against claims of other creditors for the unpaid balance due on his stock the amount of indebtedness of the corporation to him: *Ibid.*

The primary object of these provisions is to protect creditors of the company. Where by agreement between the company and the stockholders shares of stock were sold at much less than their par value and upon conditions by which the stockholders were not to be liable to any additional amount, and one of such stockholders became a creditor of the company for services rendered, and assigned his claim to plaintiff, on which plaintiff got judgment against the company, *held*, that plaintiff was not entitled to enforce, as against another of such conditional stockholders, payment on his stock contrary to the conditions on which it was purchased. The liability of the plaintiff's assignor on the stock held by him being as great as that of any other stockholder, his assignee should not be allowed to compel payment of the entire liability from the other holders of stock: *Callanan v. Windsor*, 78-193.

A corporation may dispose of its stock to a

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creditor for less than its par value in full payment of his debt without any liability on his part to other creditors for the excess of the par value above the amount of his debt. (Disapproving *Jackson v. Traer*, 64–469): *Clark v. Bever*, 139 U. S., 96.

1640. Legislative control.

A statute imposing upon a street railway company additional burdens in regard to paving its tracks is not unconstitutional: *Sioux City St. R. Co. v. Sioux City*, 78–742; *S. C.*, 78–367; affirmed, 138 U. S., 98.

CHAPTER 3.

AGRICULTURAL AND HORTICULTURAL SOCIETIES AND STOCK-BREEDERS' ASSOCIATION.

1677a. Entries under assumed name. 24 G. A., ch. 67, § 1. It is hereby made unlawful for any person or persons knowingly to enter or cause to be entered under an assumed name or out of the proper class for competition or to compete for any purse, prize, premium, stake or sweepstake offered or given by any agricultural or other society, association, person, or persons in the state of Iowa, or to drive any horse, mare, gelding, colt or filly, under an assumed name, or out of its proper class, where such prize, purse, premium, stake or sweepstake is to be decided by a contest of speed.

1677b. Penalty. 24 G. A., ch. 67, § 2. Any person or persons found guilty of a violation of section one of this act, shall upon conviction thereof, be imprisoned in the penitentiary for a period of not more than three years, or imprisoned in the county jail of the county in which he is convicted for any period, not more than one year, and shall be fined in any sum not exceeding one thousand dollars.

1677c. Name of horse not to be changed. 24 G. A., ch. 67, § 3. The name of any horse, for the purpose of entry for competition in any contest of speed, shall not be changed after once having contested for a prize, purse, premium, stake or sweepstake, except as provided by the code of printed rules of the society or association, under which the contest is advertised to be conducted.

1677d. Class designated by record. 24 G. A., ch. 67, § 4. The class to which a horse belongs for the purpose of an entry in any such contest of speed shall be determined by the public performance of said horse in any former contest or trial of speed, as provided by the printed rules of the society or association under which the proposed contest is advertised to be conducted.

1678a. Election of officers of horticultural society. 23 G. A., ch. 44. Said society shall hold its annual meeting each year for the transaction of its business at such time as may be fixed by said society, at which meeting officers shall be elected as follows: A president, vice-president, secretary, treasurer and librarian, who shall serve one year. The society shall also elect one-half of a board of directors, the full board not to exceed twelve in number, who shall serve two years, except vacancies on the board may be filled for the unexpired term.

[The act substitutes this for 14 G. A., ch. 25, § 3. That act seems to have been embodied in and superseded by the provisions of the Code upon the subject.]

1680a. Proceedings of Iowa Academy of Sciences. 24 G. A., ch. 62. The secretary of the state horticultural society is hereby authorized to include in his annual report to the governor, as an appendix thereto, the proceedings of the Iowa Academy of Sciences, the same to be printed and bound with the reports of said society.

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1684a. Farmers' institutes. 24 G. A., ch. 58, § 1. Whenever forty or more practical farmers of any county organize in the capacity of a farmers' county institute, with officers consisting of a president, secretary, treasurer, and an executive committee of not less than three outside of such officers, and hold a farmers' institute, remaining in session not less than two working days in each year, the county auditor, upon satisfactory proof of such an organization and such farmers' institute having been held, together with an itemized statement showing the manner in which the money herein appropriated has been expended, shall certify the same to the auditor of state, whose duty it shall be to remit to the treasurer of such county a state warrant for fifty dollars, and there is hereby appropriated out of the moneys in the state treasury, not otherwise appropriated, a sum not to exceed fifty dollars annually for such farmers' institute work in each county as aforesaid.

1684b. Fund. 24 G. A., ch. 58, § 2. The money so appropriated and paid into the county treasury shall be designated as the farmers' institute fund, and no warrant shall be drawn on such fund except by order signed by a majority of the members of the executive committee of said farmers' institute.

1684c. Objects. 24 G. A., ch. 58, § 3. The object of such institute shall be the dissemination of practical and scientific knowledge pertaining to agriculture in all its various branches.

CHAPTER 4.

INSURANCE COMPANIES.

1695. Kinds of insurance; limitation of risk. 1132; 24 G. A., ch. 29. It shall be lawful for any company organized under this chapter, or doing business in this state:

1. To insure houses, buildings, and all other kinds of property against loss or damage by fire or other casualty, and to make all kinds of insurance on goods, merchandise, or other property in the course of transportation, whether on land or on water, or any vessel or boat, wherever the same may be;

2. To make insurance on the health of individuals, and against the personal injury, disablement, and death, resulting from traveling, or general accidents by land or water;

3. To insure the fidelity of persons holding places of private or public trust;

4. To receive on deposit and insure the safe-keeping of books, papers, moneys, stocks, bonds, and all kinds of personal property;

5. To insure horses, cattle, and other live stock against loss, or damage by accident, theft, or any unknown or contingent event whatever which may be the subject of legal insurance; to lend money on bottomry or respondentia, and to cause itself to be insured against any loss or risk it may have incurred in the course of its business, and upon the interest which it may have in any property, by means of any loan which it may have made on mortgage, bottomry, or respondentia, and generally to do and perform all other matters and things proper to promote these objects.

6. To insure employers against loss in consequence of accidents or casualties of any kind to persons or property, or both, resulting from any act of any one in their employ or from any accident or casualty to persons or property, or both, occurring in or connected with the transaction of their business, or from the operation of any machinery connected therewith except such insurance as is provided for in subdivision 7 hereof.

7. To insure against loss or injury to person or property or both, growing out of explosion or rupture of steam boilers.

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But no company shall issue policies of insurance for more than one of the above seven mentioned purposes, and no company that shall have been organized for either one of said purposes, shall issue policies of insurance for any other; and no company organized under this chapter, or transacting business in this state, shall expose itself to loss on any one risk or hazard to an amount exceeding ten per cent. on its paid-up capital, unless the excess shall be reinsured by the same in some other good and reliable company. But the restrictions as to the amount of risk any company shall assume, shall not apply to any companies organized to guaranty the fidelity of persons in places of public or private trust, nor to companies that receive on deposit and guaranty the safe-keeping of books, papers, moneys, and other personal property. [Same, § 8.]

[As amended by inserting paragraphs numbered 6 and 7 and making verbal alterations.]

1707. Regulation of foreign companies.

The fact that a policy is issued and accepted in violation of a law prohibiting a company from doing business which has not complied with certain statutory requirements will not be void as between insured and the company, the latter not being allowed to take advantage of such objection, the penalty for violation of the law being imposed upon the company alone: *Pennypacker v. Capital Ins. Co.*, 80–56.

By complying with these provisions as to the designation of an agent upon whom service may be made, the corporation becomes subject to the laws of the state, and to treatment in many respects as a domestic corporation, and liable to be sued in all respects as such a corporation would be: *German Bank v. American F. Ins. Co.*, 50 N. W. R., 53.

1717. Companies of other states.

Section applied: *State v. Fidelity & Casualty Co.*, 77–648.

1730. Notice of forfeiture.

Under this section the time when the service of notice of forfeiture is complete is the time of mailing the letter in accordance with the provisions of the statute, and not the time when such letter would in due course of mail have reached its destination (*arguendo*): *Ross v. Hawkeye Ins. Co.*, 50 N. W. R., 47.

A notice which did not advise the insured that if payment was not made the policy would be suspended, *held* not sufficient to entitle the company to take advantage of a forfeiture on account of such non-payment: *Marden v. Hotel Owners' Ins. Co.*, 52 N. W. R., 509.

1731. Cancellation.

It is optional with the company to allow a policy to remain uncanceled, and to accept payments when made, without waiving its right to insist upon prompt payment at any time thereafter: *Morrow v. Des Moines Ins. Co.*, 51 N. W. R., 3.

1732. Soliciting agents.

One soliciting insurance and taking applications therefor is the agent of the company issuing the policy, without regard to any provisions found in the policy: *Continental L. Ins. Co. v. Chamberlain*, 132 U. S., 304.

This statute is applicable to life insurance companies: *Ibid.*

It is a matter of general knowledge that the soliciting agent as a rule prepares the application for the owner, and what he does in that respect is within his powers, and binds his principal: *Jamison v. State Ins. Co.*, 52 N. W. R., 185.

An insurance company is chargeable with knowledge of facts made known to its agent at the time of taking the application, and an instruction requiring more proof of the agent's authority than was necessary, *held* not prejudicial to defendant, although erroneous: *Key v. Des Moines Ins. Co.*, 77–174.

Under the provisions of this section, *held*, that the agent of one company, who, by authority of his customer, applied to an agent of another company authorized to issue policies, for insurance on the property of his customer, was the agent for the company issuing the policy, and a mistake as between him and the agent issuing the policy was chargeable to the company, and not to the person for whose benefit the policy was issued: *St. Paul F. & M. Ins. Co. v. Shaver*, 76–282.

1733. Copy of application attached.

The provisions of this section are applicable to all kinds of insurance and policies, including those issued by benefit associations upon the mutual assessment plan: *Newman v. Covenant Mut. Ins. Ass'n*, 76–56; *McConnell v. Iowa Mut. Aid Ass'n*, 79–757.

Where one premium note was given for two policies on the same property, one against loss by fire and lightning, and one against loss by tornado, and a copy of the note was attached to the former and not to the latter, *held*, that in an action on the tornado policy, non-payment of the premium note could not be relied on: *Lewis v. Burlington Ins. Co.*, 80–259.

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1734. Evidence of value; proofs of loss.

Valuation: The policy being *prima facie* evidence of the value of the insured building, it is not incumbent upon the plaintiff in the first instance to prove such value, but evidence in respect to the value being introduced by the defendant, plaintiff may introduce evidence on that point in rebuttal: *Martin v. Capital Ins. Co.*, 52 N. W. R., 534.

Under particular facts, *held*, that the evidence as to the value of the property was sufficient, in connection with the *prima facie* evidence supplemented by the valuation stated in the policy, to support the recovery: *Hagan v. Merchants', etc., Ins. Co.*, 81–321.

A policy is not *prima facie* evidence as to the value of personal property insured. The provisions of this section as to presumption of value are applicable only to buildings: *Joy v. Security F. Ins. Co.*, 48 N. W. R., 1049; *Martin v. Capital Ins. Co.*, 52 N. W. R., 534.

Proofs of loss: Where a policy of insurance required that, if loss should occur, the assured should give the company immediate notice of the fact, and that as soon as possible after the fire proofs of loss under oath should be prepared and sent to the company, and in an action on the policy the petition showed that the proof of loss was not given within the time or in the manner required by statute, *held*, that a demurrer to the petition should have been sustained: *Von Genechtin v. Citizens' Ins. Co.*, 75–544.

Where the agent of an insurance company informed the assured that the loss would be adjusted, but it was not shown that such agent had any authority to adjust losses or bind the defendant in the adjustment of losses, *held*, that the promise of the agent that the loss would be adjusted was not a waiver of the condition as to proofs of loss: *Ibid.*

In an action upon a policy of insurance where the petition did not show the lapse of time for the maturity of the claim required by the policy nor that required by the statute, *held*, that it was sufficient ground for demurrer: *Ibid.*

Where a petition in an action on a policy of fire insurance stated that the loss occurred "on or about April 14, 1886," and that notice and proofs of loss were given "on or about June 19, 1886," *held*, that the petition did not show that more than sixty days had intervened between the loss and the notice and proof thereof: *District Tp. v. Des Moines Ins. Co.*, 75–647.

An instruction that the jury must find that the notice of loss was given to the company within a reasonable time, although the policy required the notice to be given forthwith, *held* not erroneous, the terms being so nearly synonymous that no prejudice could have resulted therefrom: *Pennypacker v. Capital Ins. Co.*, 80–56.

The proofs of loss are not admissible on the trial to establish the facts connected with the loss; but in a particular case, *held*, that they were admissible to prove by an indorsement thereon the time of their receipt by the company: *Lewis v. Burlington Ins. Co.*, 80–259.

Where the policy required the giving of notice to the secretary, *held*, that a notice to the company was a sufficient compliance: *Ibid.*

Evidence that notice and proofs of loss were deposited in the mail is admissible as showing that they were received, although their receipt is denied by the officers of the company: *Pennypacker v. Capital Ins. Co.*, 80–56.

The notice and affidavit required by this section are solely for the benefit of the insurer; and if, without objection to the sufficiency thereof, the company advises insured that it will proceed to settle the loss, it thereby waives any objection on account of defect in such proofs: *Harris v. Phœnix Ins. Co.*, 52 N. W. R., 128.

Where insured stated by letter to the company that he had no knowledge of the particulars of the fire and its origin, but did not comply with the requirement as to the proof by affidavit, and the company made no objection on that ground, *held*, that it thereby waived its right to further proof: *Green v. Des Moines F. Ins. Co.*, 50 N. W. R., 558.

It is not necessary that the notice and affidavit shall be attached together and delivered at the same time, but it is sufficient that they shall be both in the hands of the company within the time prescribed for giving notice: *Russell v. Fidelity F. Ins. Co.*, 50 N. W. R., 546.

Limitation: The limitation contained in this section as to the time for bringing the action pertains to the remedy, and cannot be controlled by stipulations in the policy of insurance: *Vore v. Hawkeye Ins. Co.*, 76–548.

The receipt of proofs of loss by the company and the assertion by it that the policy is void cannot be regarded as a waiver of this statutory provision as to the time in which action may be brought: *Ibid.*

The fact that another action on the policy would be barred by reason of limitations in the policy as to time of bringing action will not estop the company from insisting that an action commenced within ninety days is prematurely brought, and that plaintiff cannot recover therein: *Ibid.*

The effect of this provision as to the time when action may be brought is to fix the time when the loss becomes due and payable. It does not affect the maturity of the contract, but is a legislative prohibition of the action before the time specified, and if action is brought before the expiration of the ninety days it is prematurely brought and must fail. The objection may be raised by motion in arrest of judgment, without being pleaded as a defense: *Taylor v. Merchants' & Bankers' Ins. Co.*, 49 N. W. R., 994.

Where an amended petition, properly setting out the cause of action, was filed before the expiration of the time for bringing action and demurred to, *held*, that the company had sufficient notice of the amendment so that the cause of action set up therein must be deemed to have been brought within the proper time: *Jemison v. State Ins. Co.*, 52 N. W. R., 185.

This section with reference to time after which action may be brought is applicable to life insurance: *Christie v. Life Indemnity, etc., Co.*, 82–360.

Therefore, *held*, that an action commenced

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on a certificate in a benefit company within sixty days after presenting notice of loss was prematurely brought and would be abated: *Ibid.*

Also *held*, that these provisions are not unconstitutional on the ground that the subject-matter is not expressed in the title or that the act embraces more than one subject, or that it is not of uniform operation: *Ibid.*

If defendant claims that by reason of the proofs of loss not being sufficient the action is prematurely brought, he should set that out in a distinct division of his answer and not in connection with the defense that the defendant cannot recover by reason of defective proofs: *McComb v. Council Bluffs Ins. Co.*, 48 N. W. R., 1088.

CHAPTER 5.

LIFE INSURANCE COMPANIES.

1735. Regulations.

These statutory provisions are applicable to a fraternal society such as the Ancient Order of United Workmen, having life insurance and insurance against sickness and disability as its main object: *State ex rel. v. Nichols*, 78–747.

1756. Policy exempt from execution. 1182; 24 G. A., ch. 28. A policy of insurance on the life of an individual, in the absence of an agreement or assignment to the contrary, shall inure to the separate use of the husband or wife and children of said individual, independently of his or her creditors; and an endowment policy, payable to the assured on attaining a certain age, shall be exempt from liability for any of his or her debts. And the avails of all policies of insurance on the life of any individual payable to his surviving widow shall be exempt from liabilities for all debts of such beneficiary contracted prior to the death of the assured; *provided*, that in any case the total exemption for the benefit of any one person under the provisions of this section shall not exceed the sum of five thousand dollars. [Same, § 18.]

[As amended by adding the last sentence.]

Where a certificate of insurance in a mutual benefit company was made payable to the "legal" heirs of assured, *held*, that the widow of assured was not within such description, but that the proceeds of such certificate should go to the children of deceased: *Phillips v. Carpenter*, 79–600.

1760a. Discriminations prohibited. 23 G. A., ch. 33, § 1. No life insurance company doing business in Iowa shall make or permit any distinction or discrimination in favor of individuals between insurants of the same class and equal expectations of life in the amount or payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contract it makes; nor shall any such company or any agent thereof make any contract of insurance or agreement as to such contract, other than is plainly expressed in the policy issued thereon; nor shall any such company or agent pay or allow, or offer to pay or allow, as inducement to insurance any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever not specified in the policy contract of insurance.

1760b. Penalty. 23 G. A., ch. 33, § 2. Every corporation or officer or agent thereof who shall wilfully violate any of the provisions of this act, shall be fined in any sum not exceeding five hundred dollars to be recovered by action in the name of the state and on collection paid into the county treasury for the benefit of the common school fund, and a revocation of the license for three years.

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1767. Mutual benefit associations; certificates.

A "relative" for whose benefit a certificate may be taken under this section includes a step-father, after the death of the wife, on whom the relationship depends: *Simcoke v. Grand Lodge A. O. U. W.*, 51 N. W. R., 8.

The provision of this section that the beneficiary may, by the consent of the society, be changed without the consent of the person who has been such beneficiary, is in accordance with the law previously existing with reference to the effect of such certificates: *Brown v. Grand Lodge A. O. U. W.*, 80-287.

The provisions of § 1733, requiring the application of the assured to be indorsed on or attached to the policy, applies to all policies and contracts for life insurance, including those of mutual benefit associations issued upon the assessment plan: *McConnell v. Iowa Mutual Aid Ass'n*, 79-757.

This section has no reference to an assignment of the certificate by the beneficiary after the death of the insured: *Gary v. Northwestern Masonic Aid Ass'n*, 50 N. W. R., 27.

Where it was provided in the certificate of a mutual benefit society that it should be void in case the beneficiary named was not a natural heir of the member taking the certificate, *held*, that knowledge on the part of the society that the beneficiary named was not an heir of the member taking the certificate, without objection on the part of the society, and continuing to collect assessments, and continuing to treat the certificate as valid, constituted a waiver of such condition: *Lindsley v. Western Mut. Aid Soc.*, 50 N. W. R., 29.

This section does not apply to a certificate issued before the statute took effect, and therefore, *held*, that the waiver above referred to, which was also prior to the taking effect of the statute, was valid: *Ibid.*

Also *held*, that where such certificate was forfeited for non-payment of dues after the taking effect of the statute, but payment was subsequently accepted by the company, and the member was restored, such restoration did not amount to the making of a new contract, but was a waiver of the forfeiture, and the former certificate continued in force: *Ibid.*

Also *held*, that statements of the member with reference to good health, on which such restoration was made, were not false in such sense as to render such restoration void: *Ibid.*

1769. Trust funds; investments. 21 G. A., ch. 65, § 9; 24 G. A., ch. 30. Any corporation or association accumulating any moneys to be held in trust for the purpose of the fulfillment of its policy or certificate, contract, or otherwise, shall invest such accumulations in bonds of the United States; in bonds of this state or any other state if at or above par; in bonds and mortgages on unincumbered real estate within this state, or in any other state in which such company is transacting an insurance business, worth at least twice the amount loaned thereon, exclusive of improvements; in bonds or other evidences of indebtedness, bearing interest, of any county, incorporated city, town, or school district within this state or any other state in which such company is transacting an insurance business, where such bonds or other evidences of indebtedness are issued by authority of law, and are approved by the executive council; and a sum not exceeding five per cent. of the assets may be invested in stocks of national banks, now or hereafter organized under the laws of the United States; and shall deposit such securities with the auditor of state, who shall furnish such corporation or association with a certificate, under his seal of office, of such deposit, showing the purpose of such deposit and to what fund the same is to be applied when paid out and also showing the aggregate liabilities of such corporation or association at the date of issuance of such certificate, *provided*, however, that such corporation or association may invest in real estate in Iowa, such a portion of said accumulation as is necessary for its accommodation in the transaction of its business to be owned by said corporation or association, and in the erection of any building for such purpose may add thereto rooms for rental.

[As amended by inserting new provisons as to investments.]

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CHAPTER 6b.

BANKING.

1825. Fraudulent banking.

On an indictment under this act against partners doing a banking business for receiving a deposit while insolvent, evidence is admissible that such deposit was received by a duly authorized agent in the conduct of the business; and it is not necessary to aver in the indictment the fact that such deposit was received by an agent: *State v. Cadwell*, 79–432.

It is a crime under this section to receive, after insolvency, money on time deposit, for which a certificate of deposit is issued, as well as to receive general deposits: *Ibid.*

An assignment for the benefit of creditors, made five months after the receipt of the deposit, is admissible in evidence, for the purpose of showing in connection with other facts that the bank was insolvent at the time the deposit was made: *Ibid.*

The opinion of an expert book-keeper, based on the examination of the books which are in evidence, as to the fact of insolvency, is admissible: *Ibid.*

Where the defendants were a firm carrying on two banks, *held* that, for the purpose of showing insolvency at the time of the receipt of a deposit, the condition of both banks was properly inquired into: *Ibid.*

Any bank whose affairs are so situated that it cannot meet its demands in the usual course of business, is, within the meaning of the law prohibiting the receipt of deposits, insolvent; and if deposits are received with the knowledge of such condition, a crime is committed: *Ibid.*

CHAPTER 6c.

BANK EXAMINERS.

1825a. Appointment. 23 G. A., ch. 50, § 1. The auditor of state is authorized to appoint one or more bank examiners, who shall hold their office at the pleasure of the auditor of state and who shall before entering upon their official duties, give bond with approved sureties in the penal sum of two thousand dollars for the faithful discharge of their duties, which bonds shall be made to the state of Iowa, and be filed with the auditor of state.

1825b. Expenses; fees. 23 G. A., ch. 50, § 2. All banks authorized by and acting under the supervision of the auditor of state whether savings banks or state banks, so called, organized under the general incorporation laws of this state, shall pay the expense of such examinations which shall be as follows, viz.: When such examinations are made by the auditor of state he shall receive his necessary expenses only. When made by an examiner appointed by the auditor of state he shall receive from banks possessing a paid-up capital of fifty thousand dollars or under, the sum of fifteen dollars. From banks possessing a paid-up capital of more than fifty thousand dollars and under one hundred thousand dollars, the sum of twenty dollars. From banks possessing a paid-up capital of one hundred thousand dollars and under two hundred thousand dollars the sum of twenty-five dollars. And from banks possessing a paid-up capital of two hundred thousand dollars or over the sum of thirty dollars.

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TITLE X.

INTERNAL IMPROVEMENTS.

CHAPTER 2.

LEVEES, DRAINS, DITCHES AND WATER-COURSES.

1846. Levees; curative act.

Where the proceedings of a board of supervisors for the construction of a levee were void for want of jurisdiction because a petition was not filed in the office of the county auditor, signed by a majority of the persons residents of the county owning lands adjacent to the improvement, setting forth the necessity for the same, and the starting point, route and *termini*, *held*, that as the legislature might have dispensed with this requisite in the first instance, it was within its power to do so by a subsequent curative act: *Richman v. Supervisors of Muscatine County*, 77–513.

1852. Assessment; repairs.

The statute does not prescribe that in proceedings for the re-opening and repair of a ditch a petition shall be presented asking that the work be ordered, etc. Those things are required when the ditch is first established and the work done, but not in case of repairs ordered: *Yeomans v. Riddle*, 50 N. W. R., 886.

The supervisors, by the petition, notice and other prior proceedings, acquired jurisdiction of the matters involved, and of the lands and land-holders, and the ditch having been constructed, the statute empowers them to keep it in existence in the manner prescribed in this section: *Ibid.*

When it becomes necessary to re-open or repair a ditch, the auditor has power, without petition, and without direction of the supervisors, to appoint the commissioners contemplated by this section, who shall make an apportionment of the expenses and report to the board, whose duty it then becomes to assess such expenses and costs upon the owners of the lands benefited: *Ibid.*

The repair of the ditch may involve work to be done elsewhere than in or at it. Its faults and imperfections may be removed by subsequent repairs and changes. It may become necessary to seek a new outlet and terminus in order to find the necessary fall: *Ibid.*

The assessment under this section for repairs is in the nature of a tax, and the taxpayer is not entitled to notice of the levy. The right to appeal protects his interests: *Ibid.*

Lands which are indirectly benefited by a levee, by the improvement of means of access by roads, and by the reclaiming of low, wet lands in the vicinity, may be assessed a proper proportion of the cost of the construction of the levee: *Chambliss v. Johnson*, 77–611.

After the assessment is made, it is not allowable, upon appeal, to show that the lands assessed were not benefited by the improvement, the only question which can be raised being as to whether or not they were assessed in the proper proportion: *Ibid.*

The appeal contemplated by § 1860 is from an order of the commissioners or supervisors fixing the limits of the territory proposed to be included in the lands to be assessed, and not from the assessment actually made: *Ibid.*

1860. Appeal.

The appeal contemplated by this section is from an order of the commissioners or supervisors fixing limits of the territory proposed to be included in the lands to be assessed, and not from an assessment actually made: *Chambliss v. Johnson*, 77–611.

After the assessment is made the only question which may be raised as to the assessment is whether the land in question has been assessed in its proper proportion: *Ibid.*

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CHAPTER 4.

TAKING PRIVATE PROPERTY FOR RAILWAYS.

1907. Additional depot grounds.

The railroad commissioners are authorized to allow the condemnation of additional land for depot purposes although there be no depot or station yet established at that place and therefore as yet no "depot grounds:" *Jager v. Dey*, 80–23.

It is evident that the word "city," as used in this section, is a misprint or a clerical error for "county:" *Ibid.*

1908. Assessment of damages.

Measure of damage: It may be shown that the market value of the farm crossed by the right of way will be less on account of danger from fire or other such causes: *Dudley v. Minnesota & N. W. R. Co.*, 77–408.

But it is not competent to show the assessed valuation of the property, and although the assessor may be a competent witness, he must be introduced as such: *Ibid.*

And in a particular case a verdict of $1,700 damages to a farm of three hundred and eighteen acres, *held* not excessive: *Ibid.*

The recovery of the property owner is not limited to the damages which he has sustained if the property were to be used only for the purposes to which it is devoted when such proceedings are had, but the value of the property for any purpose for which it is available may be considered. Therefore, *held*, that the value of the land as coal land might be taken into account, it not being attempted to show the value of the coal underlying the right of way: *Doud v. Mason City & Ft. D. R. Co.*, 76–488.

Damages which have resulted from an improper construction of the road cannot be considered in assessing the damage for right of way already taken. Therefore, *held*, that in such case the fact that the railroad company had excavated for a considerable distance through plaintiff's premises outside of it right of way could not be shown: *Ibid.*

The damages contemplated by the law to be allowed are the same before as after the road was built, except that in the latter case interest may be allowed: *Ibid.*

The proper rule in estimating the amount of damages is to confine the damages recoverable to those which naturally result from the taking and rightful use of the right of way and the proper construction of the road: *Ibid.*

The fact that different portions of the land are adapted to different uses, and only one of such portions is covered by the right of way, will not preclude the whole of the premises being considered in determining the damages: *Ibid.*

It is improper to ask the plaintiff what the damage was to him by the taking of the right of way. A witness who is shown to be properly qualified may be allowed to give an opinion as to the value of property, but not as to the amount of damage: *Hartley v. Keokuk & N. W. R. Co.*, 52 N. W. R., 352.

Witnesses who were shown to be farmers, and acquainted with the land in question and the value of lands in that county, *held* to be competent to testify as to the value of land before and after location of the road: *Pingery v. Cherokee & D. R. Co.*, 78–438.

Evidence as to the value of land which is taken for right of way is to be considered in assessing the damages: *Ibid.*

Risk to the property by the operation of trains, whereby fires are likely to occur, is a proper element in fixing damages but not the increase of rate of insurance on the farm buildings which will be occasioned by the operation of the road: *Ibid.*

Evidence as to the character of netting or screens used in the smoke-stacks of the company's engines is not admissible: *Ibid.*

Evidence as to the belief of the company or its mistake with reference to the ownership of the land is immaterial: *Ibid.*

The question as to whether the company will or will not furnish proper and suitable crossings cannot be considered: *Ibid.*

Surface water: Where in violation of the stipulations of a right-of-way deed the surface water was thrown by the railway company upon plaintiff's premises, *held*, that it was competent to show by witnesses how much more the land of plaintiff would have been worth if the water had been kept off plaintiff's land: *Peden v. Chicago, R. I. & P. R. Co.*, 78–131.

Damages resulting from overflows caused by the negligent construction of a culvert cannot be considered as having been included in the damages for right of way: *Hunt v. Iowa Cent. R. Co.*, 52 N. W. R., 668.

Several parcels: Where farm land is crossed by a railroad, the owner is not limited in his right of recovery to the subdivision of land crossed or touched by the right of way, but the entire farm, if it is in one tract, may be considered in the assessment of damages and the same rule is applicable to town lots: *Cox v. Mason City & Ft. D. R. Co.*, 77–20.

And where plaintiff, in an application for the appraisement of damages, asked that they might be assessed on his lots, caused by the location of the railroad of defendant across certain lots designated by number, *held*, that he asked the assessment of all legal damage resulting therefrom and did not limit his claim to the damage to the lots designated: *Ibid.*

Where plaintiff owned all the lots in a block, and several of them were crossed by the railroad, *held*, that he was entitled to recover for damage to the whole block, and testimony

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tending to show such damage was properly admitted: *Ibid.*

Where a right of way through parcels of real estate treated as an entirety is sought to be taken by statutory proceedings, the land-owner's right of recovery is not limited to the land through which the right of way is to pass, but extends to all the tracts as a whole: *Peden v. Chicago, R. I. & P. R. Co.*, 78–131.

Therefore *held*, by analogy, that where a right-of-way deed for a strip of land through a certain eighty-acre tract provided that the grantee should carry off the water in a certain manner, a breach of such contract entitled the grantor or his grantees to damages to the entire tract of which the eighty acres formed but a part: *Ibid.*

Who may recover: Where land is mortgaged and the mortgage debt remains unpaid and the land is not sufficient to pay it and the mortgagor is insolvent, damages assessed for a right of way may be recovered by the mortgagee, and the lien of the mortgagee is superior to that of an attaching creditor: *Schafer v. Schafer*, 75–349.

Under particular circumstances, *held*, that the claimant for damages was the owner of the property in such sense as to be entitled to receive whatever the company was liable to pay for the right of way: *Hartley v. Keokuk & N. W. R. Co.*, 52 N. W. R., 352.

Foreclosure of railroad mortgage: Also *held*, that it did not appear that the company had ever acquired a right of way by virtue of proceedings commenced by another company: *Ibid.*

Also *held*, that the foreclosure deed made to defendant while the proceeding was pending, the claimants in such proceeding not having been made parties to the foreclosure, was of no effect as determining the rights of such parties: *Ibid.*

Nature of proceeding: Where plaintiff sought to enjoin defendants from prosecuting an *ad quod damnum* proceeding to recover the value of certain land occupied in the construction of plaintiff's railroad, *held*, that plaintiff had an adequate remedy at law, as all questions involved in the issue could have been determined in the *ad quod damnum* proceeding: *Keokuk & N. W. R. Co. v. Donnell*, 77–221.

A refusal by the owner to grant a right of way is not necessary to confer upon the sheriff and jury power to act. The land-owner is authorized to institute a proceeding after the railway has completed its road, and when there is no intention of treating the company as a mere trespasser, and it is sufficient in such case to allege that the owner and the company could not agree upon the compensation to be paid: *Hartley v. Keokuk & N. W. R. Co.*, 52 N. W. R., 352.

1916. Costs.

Where the costs were taxed to one party, and the court was not asked to make an apportionment, *held*, that the order of the court would not be disturbed upon appeal: *Cox v. Mason City & Ft. D. R. Co.*, 77–20.

1918. Appeal.

Where damages for right of way are awarded jointly to the owner and the mortgagees of the land, upon notice to all of them, the mortgagor may maintain an appeal from the award without making the mortgagees parties thereto: *Dixon v. Rockwell, S. & D. R. Co.*, 75–367.

Where the notice of appeal describes the premises in the same way as they are described in the application for condemnation, the land-owner is not limited in his recovery of damages accruing to the portion of his premises described, but may show the damages to his entire farm: *Dudley v. Minnesota & N. W. R. Co.*, 77–408.

In the proceeding all the rights of the parties should be adjusted, and the land-owner is not entitled after appeal to bring another action to recover interest on the money deposited in accordance with the condemnation proceedings: *Jamison v. Burlington & W. R. Co.*, 78–562.

1921. Judgment.

In such a proceeding no judgment can be rendered except for costs. After the assessment, the company, by paying the costs and damages, may relieve itself from further liability. Therefore the statute of limitations does not apply to such a proceeding: *Hartley v. Keokuk & N. W. R. Co.*, 52 N. W. R., 352.

1928. Abandonment.

This statute defines what shall be regarded as an abandonment of a right of way, and nothing less than non-user for eight years will authorize the owner of the land from whom the right of way was taken to retake possession. If he does so, the company may at any time within eight years enter upon the land again and resume its use: *Fernow v. Chicago, M. & St. P. R. Co.*, 75–526.

The provisions of this section apply to the case of a railroad which has been commenced and abandoned before the enactment of the statute. The time which had expired before the enactment and after the abandonment of the work is to be taken into account in computing the eight years. A railroad company has no vested right by contract to hold a right of way which it has abandoned, and the section is not unconstitutional in that respect: *Skillman v. Chicago, M. & St. P. R. Co.*, 78–404.

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1930. Crossing streets and highways.

The company has no right to cross a street in a city or town diagonally without making compensation to abutting property owners for damages as required by § 623: *Enos v. Chicago, St. P. & K. C. R. Co.*, 78–28.

A railroad may cross a street in a city without the consent of the city council required by § 623: *Gates v. Chicago, St. P. & K. C. R. Co.*, 82–518.

The company may raise or lower the highway for the purpose of having its road cross over or under the same, but not for the purpose of making a grade crossing higher or lower than the grade of the highway: *Ibid.*

While the company may raise a highway crossing for the purpose of having its railway pass under, it is required to put such highway in as good condition as before the alteration. This authority does not exempt the company from damages for which it is otherwise liable, under the provisions of § 623, with reference to the construction of railways in streets: *Nicks v. Chicago, St. P. & K. C. R. Co.*, 50 N. W. R., 222.

The owner of property abutting upon a street over which a railway is constructed under the provisions of § 623 as amended, not being the owner of the fee of the street, cannot recover unless he can show actual damages: *Cook v. Chicago, M. & St. P. R. Co.*, 49 N. W. R., 92.

And see notes to § 623, as to damages to abutting owners where the track is laid in a street.

1936. Private crossings.

It is evident that the provisions of this section are not intended to apply to streets in cities and towns: *Gates v. Chicago, St. P. & K. C. R. Co.*, 82–518.

Where the claim was that stock escaped upon the track by reason of the gate at a private crossing being insufficient, as originally constructed, *held*, that no evidence of knowledge of the defective condition was necessary, as it would have been in the case of a failure to repair: *Morrison v. Burlington, C. R. & N. R. Co.*, 51 N. W. R., 75.

A land-owner driving cattle in through the gate at one crossing and along the right of way for the purpose of turning them out at the gate at another crossing is guilty of negligence; and in a particular case, *held*, that there was not such negligence on the part of the employees of the company after they were aware of the cattle being on the track as to render them liable for damage in killing some of the cattle: *Davidson v. Central Iowa R. Co.*, 75–22.

The obligation to erect a private crossing by reason of the provisions of this section, and not under contract between the parties, is a public obligation of such a nature that the board of railroad commissioners has jurisdiction to investigate the question and make an order with reference thereto: *State v. Mason City & Ft. D. R. Co.*, 52 N. W. R., 490.

The remedy by *mandamus* in such a case is not exclusive: *Ibid.*

1947. Street railways over highways. 18 G. A., ch. 32, § 1; 23 G. A., ch. 21; 24 G. A., ch. 22. Any street railway company now or hereafter organized under the laws of this state to operate a street railway in any city or incorporated town in this state, for the purpose of extending its railway beyond the limits of such city or town, may locate, build and operate, either by animal or motor power, its road over and along any portion of a highway which is of a width of one hundred feet or more. In such cases said company as soon as practicable shall put said highway in as good repair and condition as the same was before its use for the purpose herein contemplated, and boards of supervisors are hereby authorized to accept for highway purposes under this act conveyances of land adjoining any highway or part thereof sufficient to increase said highway to the width of one hundred feet. Provided, however, that in any county within which any street railway company desires to operate its line of railway over any highway, of not less than sixty feet in width, for a distance of not exceeding two miles beyond the limits of any city or incorporated town to any state institution there situated, said railway to be operated by animal or electric power only, the board of supervisors of such county may grant the right to such street railway, so to operate its line over said street not exceeding two miles or less, and under such limitations, rules and regulations as said board of supervisors may prescribe: provided further, that said board of supervisors shall have the power, and such power is hereby reserved to them, to rescind, amend or modify such grant, limitations, rules and regulations at any time it may so determine.

[As amended by adding the proviso and making such proviso applicable to electric power.]

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CHAPTER 5.

RAILWAYS.

1957. Foreclosure; sale.

The purchaser of a railway at foreclosure sale acquires no better rights than the company whose franchises it purchases, and where the predecessor had occupied the streets of a city by its track without having paid damages assessed to an abutting property owner, and such property owner had recovered judgment for damages, *held*, that he might maintain an action against the successor to enjoin it from the use of the streets until payment of such judgment: *Harbach v. Des Moines & K. C. R. Co.*, 80–593.

The fact that the previous company was allowed to occupy the street by the property owner without payment of damages would be a favor to it only and not a right passing to its successor by a foreclosure sale: *Ibid.*

1960. Receiver.

The receiver of a railroad, and not the company, is liable for injuries to stock, under the provisions of § 1972: *Brockert v. Central Iowa R. Co.*, 82–369.

1971. Cattle-guards.

A railroad company is required to use ordinary care and diligence to keep the cattle-guards on its track free from snow and ice, after it has notice, or could have acquired notice in the exercise of ordinary care, that they are obstructed thereby: *Grahlman v. Chicago, St. P. & K. C. R. Co.*, 78–564; *Robinson v. Chicago, R. I. & P. R. Co.*, 79–495; *Giger v. Chicago & N. W. R. Co.*, 80–492.

A cattle-guard is not to be deemed a part of the fence required by other statutory provisions, and the company is not liable in double damages for failure to construct a cattle-guard: *Rhines v. C. & N. W. R. Co.*, 75–597.

While the language of this section seems to preclude proof of contributory negligence as a defense in an action to recover for personal injuries at a defective highway crossing (that is, negligence of plaintiff contributing, with that of defendant, to cause the injury), it does not preclude defendant from showing that the injury was due to plaintiff's fault and not to the defective condition of the crossing: *McKelvy v. Burlington, C. R. & N. R. Co.*, 51 N.W. R., 172.

1972. Liability for stock killed; speed at depots; damages by fire.

Receiver: Where a railroad is being operated by a receiver, the receiver, and not the company, is liable under the provisions of this section: *Brockert v. Central Iowa R. Co.*, 82–369.

Sufficiency of fence: The company is required to do no more than erect such fence as under ordinary circumstances will keep livestock from its track, and it is not rendered liable by the fact that snow-drifts cover the fence so that it no longer restrains stock from passing over. It is not required to remove such drifts: *Patten v. Chicago, M. & St. P. R. Co.*, 75–459.

Where it appeared that the fence was in good condition in the evening and stock escaped through it during the night, *held*, that there was not negligence in failing to repair: *Davidson v. Central Iowa R. Co.*, 75–22.

While there may be facts justifying the opening of the fence along the right of way at a place not a crossing, yet where plaintiff does not make the claim in his petition as a ground of negligence on the part of the company that the crossing is defective, he cannot afterwards show that there was a ditch in such crossing as a reason for taking down the fence: *Ibid.*

In a particular case, *held*, that it did not appear that the employees of a railway were negligent, after discovering animals which had come upon the track through the fence, in not avoiding injury to such animals: *Ibid.*

Where the claim was that stock escaped upon the track by reason of the gate at a private crossing being insufficient, as originally constructed, *held*, that no evidence of knowledge of the defective condition was necessary, as it would have been in the case of failure to repair: *Morrison v. Burlington, C. R. & N. R. Co.*, 51 N. W. R., 75.

Injury to animals: The absence of a collision of the train with the stock will not relieve the railway company from liability if the death of the animals results from the want of a fence: *Van Slyke v. Chicago, St. P. & K. C. R. Co.*, 80–620.

Under the evidence of a particular case, *held*, that it sufficiently appeared that the death of the animal was due to defendant's train: *Ibid.*

In an action to recover the value of a mare alleged to have been killed by defendant's train, where it appeared that the animal was found in a cattle-guard so injured that she afterwards died, *held*, that there was an absolute want of evidence to show that she was injured by the train in any way: *Brockert v. Central Iowa R. Co.*, 75–529.

In an action to recover damages for the killing of an animal by defendant in the operation of its railroad, where the evidence for plaintiff was wholly circumstantial, while defendant's employees testified that no accident had occurred, *held*, that the jury were authorized in finding that the injury occurred by reason of contact with a train in some way: *Cox v. Burlington & W. R. Co.*, 77–478.

Under the facts of a particular case, *held*, that there was sufficient evidence of the fact that the animal in question had been killed in

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the operation of the railroad to support the verdict against the company: *Brockert v. Central Iowa R. Co.*, 82–369.

Burden of proof: Where issue is taken upon the facts as to the place where the stock was killed or injured, and the right to fence at such place, and whether the stock was running at large, the burden is on the plaintiff to sustain the averments of his petition by proofs: *Taylor v. Chicago, St. P. & K. C. R. Co.*, 76–753.

But where defendant in an action for such damages admitted that six of the seven animals claimed to have been injured were killed by trains operated on its road, and added a general denial as to the facts not admitted, pleading a tender as to the animals killed, *held*, there was no issue except as to the injury of the seventh animal: *Ibid.*

Instructions in a particular case as to what the jury must find in order to return a verdict for plaintiff, *held* to sufficiently indicate the rule as to burden of proof: *Scott v. Chicago, M. & St. P. R. Co.*, 78–199.

Negligence of owner: The fact that cattle have previously been found at a crossing does not make it incumbent upon the railroad company to run its trains at such rate of speed as to subsequently avoid injury of stock at such crossing. An owner who allows his stock to frequent a crossing is responsible for recurring accidents at such place: *Connyers v. Sioux City & P. R. Co.*, 78–410.

Recovery under this section will not be defeated by mere negligence on the part of the owner of the stock, but the act must be one immediately connected with the injury: *Moody v. Minneapolis & St. L. R. Co.*, 77–29.

Therefore, where plaintiff's cow, being at large, strayed upon defendant's unfenced railroad track, and defendant did all in its power to stop the train, but failed to do so, and when plaintiff knew that the animal had gone upon the track and had both the opportunity and power to prevent the injury, but wilfully neglected to do so, *held*, that his act was a "wilful act" connected with the injury, and he was not entitled to recover: *Ibid.*

Ownership of animals: The administrator of the estate is the owner of the animals belonging to the estate, within the meaning of this section: *Morrison v. Burlington, C. R. & N. R. Co.*, 51 N. W. R., 75.

Proof of tender by the company made to plaintiff, *held* sufficient to show plaintiff's ownership: *Scott v. Chicago, M. & St. P. R. Co.*, 78–199.

Animals at large: Where the driver of a team became so intoxicated that he had no control over the animals, and they wandered out of the road and upon a railway track, where it was not fenced as it should have been, *held*, that the animals were not running at large in such sense that the owner could recover double damages: *Grove v. Burlington, C. R. & N. R. Co.*, 75–163.

Where colts escaped from a pasture through a defective gate upon defendant's track, the gate having been carelessly and negligently constructed by defendant, in an unskilful manner and of unsound and unsafe material, *held*, that such colts were running at large, within the provisions of this section: *Morrison v. Burlington, C. R. & N. R. Co.*, 51 N. W. R., 75.

Double damages: The provision for double damages being penal in its character will not be considered as applicable to any case not coming clearly within its provisions. Therefore, *held*, that double damages could not be recovered for injuries resulting from failure to construct and keep in repair a proper cattle-guard as required by the statute with reference to cattle-guards: *Rhines v. Chicago & N. W. R. Co.*, 75-597.

The provision as to double damages is not unconstitutional as authorizing a person to be deprived of his property without due process of law or denying him the equal protection of the law: *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S., 26.

Notice: The statute is silent as to the method of service, and such service may be made by reading the original and delivering a copy: *Van Slyke v. Chicago, St. P. & K. C. R. Co.*, 80–620.

The notice should advise the corporation of the loss of which complaint is made and of the demand of the person injured on account of it, and in an action in such a case to recover double damages plaintiff's recovery should be limited to double the amount named in the notice: *Manwell v. Burlington, C. R. & N. R. Co.*, 80–662.

Where the owner of stock expends time and money in proper efforts to heal the injured animals he is entitled to recover double damages with reference to such injuries, as well as with reference to the loss in value: *Ibid.*

The land-owner may by his conduct release the railway company from liability for its failure to build and maintain a fence, and the tenant who has a right to occupy and use the land jointly with the owner, with knowledge of such facts, acquires no greater rights than the lessor himself: *Ibid.*

The service of a notice in a particular case, *held* sufficient; and *held* that there being no conflict as to the facts, the question of whether the service of notice was sufficient or not was for the court and not for the jury: *Brockert v. Central Iowa R. Co.*, 82–369.

Payment: Where the owner of stock killed and the agent of the railroad company agreed as to the amount of damages, and the agent gave to the owner a due-bill for that amount, which he said would be paid in a few days, and the due-bill remained unpaid, and no demand of payment thereof was made, *held*, that the owner could not maintain an action against the company for double damages, and in such action no recovery could be had on the due-bill: *Shaw v. Chicago, R. I. & P. R. Co.*, 82–199.

There is no obligation upon the person claiming damages for injuries to stock, who has served his notice upon the company, to remain in readiness for each of the thirty days elapsing after the giving of the notice to meet the agent of the company and negotiate a settlement of such loss. The fact that the agent of defendant calls at the residence of claimant to pay the amount of damage, and does not make such payment by reason of not finding him at home, does not excuse the defendant as against the claim for double damages: *Ham-*

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mans v. Chicago, R. I. & P. R. Co., 48 N. W. R., 978.

Fencing at depot grounds: Whether the public convenience and interest of the road require that grounds used in connection with the depot but not the ordinary place for receiving and delivering freight shall be left unenclosed is a question of fact properly submitted to the jury: *Rhines v. Chicago & N. W. R. Co.*, 75–597.

Speed at depots: The fact that a train running at a higher rate of speed than is allowed at depot grounds runs into a team which is being driven across the track in such grounds will not render the company liable in double damages: *Johnson v. Chicago & N. W. R. Co.*, 75–157.

Evidence in a particular case *held* sufficient to show that the train of defendant causing injury to stock was running at the depot grounds at a greater rate of speed than eight miles per hour: *Story v. Chicago, M. & St. P. R. Co.*, 79–402.

If by excessive speed upon the station grounds animals are stampeded and run upon the track, and without checking the speed are run down and killed, the cause and effect are so closely connected that it may be said that the unlawful speed of the train is the proximate cause of the injury, although the animals are not actually killed or injured upon the depot grounds: *Ibid.*

Fires: Plaintiff in the reasonable attempt to save the property of another from destruction by a fire set out by defendant's negligence received severe personal injuries. *Held*, that such injuries were so far the proximate result of defendant's negligence in setting out the fire that recovery could be had therefor: *Liming v. Illinois Cent. R. Co.*, 81–246.

In an action to recover damages for destruction of property by fire set out by an engine of a railroad company, *held*, that the question to be determined was whether the engine of the defendant set out the fire, and, if so, whether it was properly constructed and operated, and in good condition: *Metzgar v. Chicago, M. & St. P. R. Co.*, 76–387.

And *held* that the duty of the railroad company to use the best devices available to prevent the escape of fire would not depend in any manner upon the usage of other roads; and evidence that the same kind of an engine as that setting out the fire was in general use on other roads was not admissible: *Ibid.*

Where hay destroyed in such a fire had been cut by plaintiff upon uninclosed prairie land, under a license, *held*, that he had sufficient title to recover damages for the destruction thereof although the license was given by one who had no authority to convey an interest in the land: *Ibid.*

In an action to recover for loss of property destroyed by fire from an engine, *held*, that the petition need not allege negligence on the part of the defendant, as the fact that the fire was set out in the operation of its railroad was *prima facie* evidence of negligence sufficient to authorize a recovery in the absence of evidence overcoming the legal presumption: *Seska v. Chicago, M. & St. P. R. Co.*, 77–137.

In case of damages from fires, the presumption is that the corporation operating the road is guilty of negligence. It is not necessary for plaintiff to allege negligence, nor will such unnecessary allegation of negligence change the rule of proof: *Engle v. Chicago, M. & St. P. R. Co.*, 77–661.

It is sufficient for plaintiff suing in such cases to set forth in his pleading simply the occurrence of the injury. The presumption of liability arising from the occurrence itself is not necessarily overcome by proof merely that the company were not guilty of negligence in the matters which were the immediate cause of the injury, as permitting combustible material to accumulate and remain on the right of way. The burden of proving such fact is not upon plaintiff, even though he may allege it in his petition: *Ibid.*

Where part of an instruction, considered alone, appeared to hold a railroad company liable for the consequences of slight negligence in setting out a fire, but where the whole instruction considered together expressed the rule that it was held only to ordinary care and diligence, *held*, that the objectionable clause was no ground for reversal: *Ibid.*

There being no question as to where and how the fire originated, and it not being alleged as negligence that the right of way was in an improper condition, *held* error to refuse an instruction to the effect that the question as to whether or not the right of way was clean and free from grass and other combustible matter was immaterial: *Comes v. Chicago, M. & St. P. R. Co.*, 78–391.

In an action to recover damages from defendant for fire claimed to have been communicated to plaintiff's premises, either directly or indirectly from defendant's engine, *held*, that evidence that charred shingles, after the fire and on the same day, were found a quarter of a mile beyond the house burned, and in the direction the wind was blowing, was admissible to show that the fire was communicated from the defendant's engine, or burning timbers on defendant's right of way about four hundred feet distant: *Knight v. Chicago, R. I. & P. R. Co.*, 81–310.

Where it was shown that large cinders were thrown out through the smoke-stack of the engine, and that the spark-arrester of the engine, permitting such cinders to escape, was out of repair, *held*, that the jury might infer that the employees operating the engine observed such cinders and sparks and were thereby informed of the defective condition of the engine: *Ibid.*

Proof that fire started in a field about one hundred and sixteen feet from the railroad track a few minutes after a train had passed, *held* evidence that such fire originated from such engine: *Greenfield v. Chicago & N. W. R. Co.*, 49 N. W. R., 95.

Proof of damage in such case is *prima facie* evidence of negligence on the part of the company: *Ibid.*

In order that the company may negative its negligence in such case so as to escape liability, it must negative every fact the proof of which would justify the finding of negligence: *Ibid.*

Evidence of the occurrence of the fire may

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be sufficient to discredit the testimony of the engineer as to the engine being in good condition: *Ibid.*

Measure of damage for property destroyed by such a fire is the difference between the value before and the value after the fire, so that in regard to damage to growing timber, *held*, that it was the loss of value of the growing timber as growing, and not the value it would have had as cut up into cord-wood, that was the measure of damage: *Ibid.*

In an action to recover the value of trees destroyed by fire set out by defendant's engines, *held*, that a witness was properly permitted to testify that it would be difficult to grow trees in the place of those destroyed, by reason of the shade of other trees, as such evidence would have a bearing upon the value of the trees destroyed: *Leiber v. Chicago, M. & St. P. R. Co.*, 50 N. W. R., 547.

Where damages were claimed for injuries to meadow, grass and trees, *held*, that evidence might properly be received as to the depreciation in value of the meadow, trees, etc., by reason of the fire, and that the cost of restoration was not the proper measure: *Hamilton v. Des Moines & K. C. R. Co.*, 50 N. W. R., 567.

Since the enactment of the provision relating to liability for damages from fires, contributory negligence of the person injured cannot be shown as a defense: *West v. Chicago & N. W. R. Co.*, 77-654; *Engle v. Chicago, M. & St. P. R. Co.*, 77-661; *Johnson v. Chicago & N. W. R. Co.*, 77-666.

The frequent occurrence of fires caused by the same engine on the same trip may be shown for the purpose of proving that it was defective in its construction, or that it was out of repair or negligently handled: *Johnson v. Chicago & N. W. R. Co.*, 77-666.

One who cuts hay on uninclosed land owned by others without authority acquires no property in the hay: *Comes v. Chicago, M. & St. P. R. Co.*, 78-391.

Where plaintiff sought to recover for hay made from grass cut from uninclosed land of another, *held*, that there was such license given by persons purporting to act as agents of the owner, and ratified by such owner, as to show title in plaintiff: *Bullis v. Chicago, M. & St. P. R. Co.*, 76-680.

Where plaintiff suing to recover for destruction of hay by fire set out by defendant in the operation of its road showed that such hay was cut and stacked upon land leased by him from the person claiming to be owner thereof, *held*, that he was entitled to recover without proving title in his landlord, there being no adverse claim made: *Johnson v. Chicago & N. W. R. Co.*, 77-666.

Evidence in a particular case *held* to sufficiently show that the fire causing the damage complained of originated from the defendant's engines: *Ibid.*

Where it does not appear that title to the premises injured is in dispute, oral evidence of such title not objected to may be sufficient to show plaintiff's title to recovery, and an objection to such evidence of plaintiff's title, not made until by motion to take the case from the jury, is too late: *Fish v. Chicago, R. I. & P. R. Co.*, 81-280.

Instructions as to sufficiency of evidence to show a destruction of plaintiff's property by fire set out by defendant on its right of way, considered: *Ibid.*

1974. Penalty for failure to fence. 22 G. A., ch. 30, § 2; 23 G. A., ch. 20, § 1. If any corporation or officer thereof or lessee owning or engaged in the operation of any railroad, in this state, neglect or refuse to comply with any provision of section one of this act [§ 1973], such corporation, officer or lessee, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding five hundred dollars for each and every offense. And every thirty days' continuance of such refusal or neglect shall constitute a separate and distinct offense within and for the purposes of this act. The time fixed in this act for fencing railways, shall not apply to railway companies owning or operating third class or class "C" railways, as classified by the railroad commissioners. Such railway shall be fenced as follows; twenty-five per cent. of the entire length of the road, not including any fencing already done shall be fenced, as herein provided, during the year 1890, and twenty-five per cent. of such entire length each year thereafter, until the whole thereof is fenced.

[As amended by the addition of the provisions relating to third class or class "C" railways.]

1974a. Fines remitted. 23 G. A., ch. 20, § 2. All penalties and fines which have been heretofore incurred under chapter thirty [§§ 1973, 1974] by any railway company owning or operating a third class or class "C" railway, or by any officer or lessee thereof, by reason of a failure to fence according to the provisions of said chapter thirty of the acts of the Twenty-second General Assembly, are hereby released and remitted, and no suit or prosecution shall be instituted by reason of any such failure; but nothing herein contained shall be construed to exempt any such railway company, lessee or officer,

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from the fines and penalties provided in said act, if any such road is not fenced in compliance herewith.

[For the provisions as to the use of automatic couplers and brakes, see 23 G. A., ch. 18, and 24 G. A., ch. 23, *infra*, §§ 5419*a*–5419*g*.]

1978. Foreign railway corporations.

A railway company complying with these requirements is not entitled to personal service of notice in a proceeding to locate a highway over its land where its ownership thereof does not appear by the transfer books. It is in no better position than a domestic railway company in this respect: *State v. Chicago, M. & St. P. R. Co.*, 80–586.

1996. Liability of successor.

Where a railroad was bought in by a new corporation at foreclosure sale under a mortgage, *held*, that such purchaser could be compelled to comply with the decree rendered against the former company, while in the hands of a receiver, directing the operation of its road between certain points: *State v. Iowa Cent. R. Co.*, 50 N. W. R., 280.

Under a contract for the transfer of a line of railroad from one company to another, *held*, that the transferee assumed any liability existing against the transferrer for injury to an employee: *Knott v. Dubuque & S. C. R. Co.*, 51 N. W. R., 57.

1997. Alienation of franchise.

Cases are contemplated in this section where payments are to be made to the company upon delivery of stock, and it also contemplates that the ownership of property rights, powers and franchises may legally pass to another company while such contracts for payments exist. The section embraces obligations for payment of taxes voted, and also voluntary conveyances by one company to another, in which the delivery of stock to tax-payers shall be provided for. Therefore, *held*, that a transfer by the company in whose favor the tax was voted to another company did not forfeit the tax voted, stock in the new company of equal or greater value than that of the company to whom the tax was voted being offered to the tax-payer: *Cantillon v. Dubuque & N. W. R. Co.*, 78–48.

2002. Injury to employee.

A railway company cannot avoid liability for the negligence of its employees by requiring of an employee injured by reason of such negligence more than reasonable care in the discharge of his duties: *Scagel v. Chicago, M. & St. P. R. Co.*, 49 N. W. R., 990.

Where a "wiper" is in temporary charge of an engine, the railroad company is liable for his negligence resulting in injury to a brakeman in coupling cars: *Whalen v. Chicago, R. I. & P. R. Co.*, 75–563.

And it is immaterial in such case whether the train was being made up at the usual and proper time or not: *Ibid.*

A workman employed to shovel snow for the clearing of the track, and being transported on defendant's train for the purpose of performing such service, is engaged in the operation of the road in such sense as entitles him to recover for injuries received by reason of negligence of employees operating the train: *Smith v. Humeston & S. R. Co.*, 78–583.

A section-hand, while riding on a hand-car holding a shovel for the purpose of clearing snow from the rail, is engaged in the operation of the road within the provision of this section, so as to be entitled to recover for injuries received by reason of negligence of the foreman in charge of the car: *Chicago, M. & St. P. R. Co. v. Artery*, 137 U. S., 507.

A person who has charge and full control of a timber-yard of a railroad company is to be regarded as a vice-principal, and one who has the care and management of the business in his absence is a tempory vice-principal, and the railroad company is liable for injuries to a subordinate employee caused by the negligence of either of these persons: *Baldwin v. St. Louis, K. & N. W. R. Co.*, 75–297.

And notice to the person temporarily in charge of the yard of the defective piling of the timber which caused the injury would be notice to the company, regardless of the fact as to whether or not such person in charge of the business was charged with any duty in regard to piling the timber: *Ibid.*

2003. Signals.

This section imposes a duty, the omission of which is negligence; but before the person injured by it can recover, he must show that his negligence did not contribute to the injury: *Sala v. Chicago, R. I. & P. R. Co.*, 52 N. W. R., 664.

The ringing should be continued from the time of reaching the sixty-rod limit until the crossing is reached: *Lapsley v. Union Pacific R. Co.*, 50 Fed. R., 172.

The liability of the company for failure to give signals as here required at a crossing is not limited to persons about to cross, but the company will be liable to any person injured, where the injury is due to failure on the part of the company to give the signal as required: *Lonergren v. Illinois Cent. R. Co.*, 49 N. W. R., 852.

Therefore where, by reason of the failure of the company to give a signal at a crossing on

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approaching the depot grounds, a person who was engaged in unloading a car on such grounds was not aware of the approach of the train, and was unable to take precautions against the frightening of his team, and his horses ran away and were injured, *held*, that the company was liable: *Ibid.*

[As to automatic couplers and brakes, see 23 G. A., ch. 18, and 24 G. A., ch. 23, *infra*, §§ 5419*a et seq.*]

2007. Limiting liability.

A contract limiting the amount of recovery for loss of baggage is invalid: *Davis v. Chicago, R. I. & P. R. Co.*, 49 N. W. R., 77.

Where a bill of lading was executed in Dakota, valid according to the laws of Dakota, for the transportation of goods from that state into Iowa, *held*, that stipulations therein relating to liability for loss of the goods would be recognized in an Iowa court with reference to the loss occurring in Iowa, although contrary to the Iowa statute: *Hazel v. Chicago, M. & St. P. R. Co.*, 82-477.

2033. Orders by railroad commissioners.

This act makes no provision for commissioners making orders other than in an advisory way, but under it the commissioners have authority to consider whether a railroad should put in a private crossing for a landowner whose land is divided by the right of way: *State v. Mason City & Ft. D. R. Co.*, 52 N. W. R., 490.

2041. Penalty for unjust charges.

Where actions were brought against a railway company for the recovery of unreasonable and excessive charges paid for freight, *held*, that the cause of action accrued when the charges were paid, and not when the fact of the discrimination was discovered: *Carrier v. Chicago, R. I. & P. R. Co.*, 79-80.

But where the company had fraudulently concealed the fact that the amount paid by plaintiff was unreasonable and in excess of that paid by other shippers, *held*, that the statute of limitations did not begin to run until the fact was discovered: *Ibid.*

This section is not applicable to interstate commerce: *Cook v. Chicago, R. I. & P. R. Co.*, 75-169.

In an action brought to recover excessive charges for interstate transportation, *held*, that plaintiff might by amendment abandon the claim therefor under this section and ask the relief to which he would be entitled at common law: *Ibid.*

2047. Enforcing commissioners' orders.

The statute clearly contemplates that only such orders of the railroad commissioners as are reasonable and just shall be enforced. And the reasonableness and justness of such an order can only be for the determination of the courts, when it is made by the commissioners, and proceedings are taken for its enforcement. The proceeding in the courts for the enforcement of such an order is an equitable one, and the reasonableness or the justness of the order is to be determined from equitable considerations. So far as the public are concerned, the judgment of the commissioners is conclusive: *State v. Des Moines & Ft. D. R. Co.*, 51 N. W. R., 88.

In a particular case, *held*, that an order of commissioners requiring the rebuilding of a portion of the track of a road which had received a land grant for the construction of such road was unreasonable, where it appeared that by means of the operation of a leased track, parallel with the track washed away, the road was furnishing the same accommodations to the public that it would furnish if such portion of its track should be rebuilt: *Ibid.*

Where a decree was entered during the time a railroad was in the hands of a receiver, compelling such railway and its officers, etc., to operate a certain part of the line, and afterwards another company purchased the franchise and property on the foreclosure of a mortgage, *held*, that the decree could be enforced as against such purchaser: *State v. Iowa Cent. R. Co.*, 50 N. W. R., 280.

A decision of the railroad commissioners with reference to the obligation of a company to put in a private crossing for one whose land is divided by the right of way is a ruling affecting a public right within the meaning of this section: *State v. Mason City & Ft. D. R. Co.*, 52 N. W. R., 490.

While *mandamus* is a proper remedy in such a case it is not exclusive: *Ibid.*

2057. Penalty.

The legislature may constitutionally prescribe rules permitting recovery of attorney's fees in a particular class of cases and denied in all others: *Burlington, C. R. & N. R. Co. v. Dey*, 82-312.

2059. Regulation of rates.

The law requires reasonable rates, and the defendant may show that the rate fixed by the commission is unreasonable. The *prima facie* evidence that it is reasonable will not prevail when it is shown that it is in fact not so: *Burlington, C. R. & N. R. Co. v. Dey*, 82-312.

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2065. Commissioners to make schedules.

The supreme court of the United States has decided that a statute of Minnesota giving the board of railroad commissioners authority to make a schedule of rates which shall be conclusive as to what are reasonable charges, without any opportunity for judicial investigation as to whether they are reasonable, is unconstitutional: *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S., 418; *Minneapolis Eastern R. Co. v. Minnesota*, 134 U. S., 467.

Judge Brewer, of the United States circuit court for the southern district of Iowa, granted a preliminary restraining order against the commissioners to prevent them from putting into effect a schedule of rates under this section until it could be determined whether such rates would afford some compensation to the owners of railroad property: *Chicago & N. W. R. Co. v. Dey*, 35 Fed. R., 866. Subsequently it was held that the evidence did not show that the rates would not be compensatory, and the restraining order was dissolved and a preliminary injunction refused: *Chicago, B. & Q. R. Co. v. Dey*, 38 Fed. R., 656.

2070. Annual reports to commissioners. 22 G. A., ch. 28, § 22; 24 G. A., ch. 27. The said board of railroad commissioners is hereby authorized to require annual reports from all common carriers subject to the provisions of this act, to fix the time and prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the said commissioners may need information. Such annual reports shall show in detail the amount of the capital stock issued, the amounts paid therefor, and the manner of the payment of the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the costs and value of the carrier's property, franchises and equipment; the number of employees, and the salaries paid each class; the amounts expended for improvements each year, how and where expended and the character of such improvements; the earnings and receipts from each branch of business, and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations, concerning fares or freights, or agreements, arrangements, or contracts with other common carriers as the commissioners may require; and the said board of commissioners may within its discretion for the purpose of enabling it the better to carry out the purpose of this act (if in the opinion of the commissioners it is practicable to prescribe such uniformity and methods of keeping accounts), prescribe a period of time within which all common carriers subject to the provisions of this act, shall have as near as may be a uniform system of accounts and the manner in which such accounts shall be kept. Such reports shall also contain such other statistics of the road and of its transportation business for the year ending upon the thirtieth day of June of each year as the commissioners shall require, and all such reports shall be made to said board of railroad commissioners, on or before the fifteenth day of September of each year. The board of railroad commissioners is also hereby authorized to require of any and all common carriers, subject to the provisions of this chapter, such other reports, besides the annual reports hereby required, as in the judgment of such board of commissioners shall be deemed necessary and reasonable. Such reports shall be in such form and concerning such subjects and be from such sources as the commissioners shall require, except as otherwise provided herein. The time when such reports shall be filed shall be fixed by the board of railroad commissioners. Any corporation, company or individual owning or operating a railway within this state which shall fail, neglect or refuse to make any of the reports provided for herein by the date fixed herein, or that fixed by the board of railroad commissioners, shall be subject to, and pay a penalty in the sum of one hundred dollars for each and every day of delay in making such reports after the date fixed.

[As amended by adding the latter part of the section.]

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2080a. Joint rates. 23 G. A., ch. 17, § 1. Chapter twenty-eight of the acts of the Twenty-second General Assembly is amended as follows: Said chapter twenty-eight of the acts of the Twenty-second General Assembly [§§ 2049–2080] shall not be construed to prohibit the making of rates by two or more railroad companies for the transportation of property over two or more of their respective lines of railroad within this state, and a less charge by each of said railroad companies for its portion of such joint shipment than it charges for a shipment for the same distance wholly over its own line within the state shall not be considered a violation of said chapter twenty-eight of the acts of the Twenty-second General Assembly, and shall not render such railroad company liable to any of the penalties of said act, but the provisions of this section shall not be construed to permit railway companies, establishing joint rates, to make by such joint rates any unjust discrimination between the different shipping points or stations upon their respective lines between which joint rates are established, and any such unjust discrimination shall be punished in the manner and by the penalties provided by chapter twenty-eight of the acts of the Twenty-second General Assembly.

2080b. Reasonable through rates. 23 G. A., ch. 17, § 2. All railway companies doing business in this state shall, upon the demand of any person or persons interested, establish reasonable joint through rates for the transportation of freight between points upon their respective lines within this state, and shall receive and transport freight and cars over such route or routes as the shipper shall direct. Car-load lots shall be transferred without unloading from the cars in which such shipments were first made, unless such unloading in other cars shall be done without charge therefor to the shipper or receiver of such car-load lots, and such transfer be made without unreasonable delay and less than car-load lots shall be transferred into the connecting railway's cars at cost, which shall be included in and made a part of the joint rate adopted by such railway companies or established as provided by this act. When shipments of freight to be transported between different points within this state are required to be carried by two or more railway companies operating connecting lines, such railway companies shall transport the same at reasonable through rates and shall at all times, give the same facilities and accommodations to local or state traffic as they give to inter-state traffic over their lines of road.

This act relating to the establishment of joint rates over connecting lines within the state, *held* not unconstitutional: *Burlington, C. R. & N. R. Co. v. Dey*, 82–312.

It will be presumed under this statute that the railroad commissioners will rightly discharge their duties, and will fix reasonable and just joint through rates. If these officers fail in their duty, from errors of judgment, or from other causes, the railroads may cause their action to be reviewed and corrected: *Ibid.*

The railroad companies are not by this act compelled to enter involuntarily into contract relations with each other, but it simply provides that in case of failure to adopt joint rates, the railroad commissioners shall prescribe them, and the company shall not be permitted to charge more: *Ibid.*

2080c. Commissioners may establish. 23 G. A., ch. 17, § 3; 24 G. A., ch. 25. In the event that said railway companies fail to establish through joint rates or fail to establish and charge reasonable rates for such through shipments, it shall be the duty of the board of railroad commissioners and they are hereby directed, upon the application of any person or persons interested, to establish joint rates for the shipment of freight and cars over two or more connecting lines of railroad in this state, and in the making of such rates and in changing or revising the same, they shall be governed as near as may be, by all the provisions of chapter 28 of the acts of the Twenty-second General Assembly [§§ 2049–80], and shall take into consideration the average of rates charged by said railway companies for shipments within this state for like distances over their respective lines, and rates charged by the railway

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companies operating such connecting lines for joint inter-state shipments for like distances. The rates established by the board of railroad commissioners shall go into effect within ten days after the same are promulgated by said board, and from and after that time the schedule of rates shall be *prima facie* evidence in all of the courts of this state that the rates therein fixed are reasonable and just maximum rates for the joint transportation of freight and cars upon the railroads for which such schedules have been fixed.

[As amended by inserting near the end of the section certain words which were omitted from the original act as passed.]

The charges fixed by the railroad commissioners are made *prima facie* evidence of their reasonableness, and no penalty is provided, except the penalty authorized by 23 G. A., ch. 28, for imposing unreasonable charges. The joint rates fixed by the latter act are, therefore, not absolute, but *prima facie* evidence only of their reasonableness and justness: *Burlington, C. R. & N. R. Co. v. Dey*, 82–312.

2080d. Notice; division. 23 G. A., ch. 17, § 4. Before the promulgation of such rates as provided in section 3 of this act [§ 2080*c*], the board of railroad commissioners, shall notify the railroad companies interested in the schedule of joint rates fixed by them; and they shall give said railroad companies a reasonable time thereafter to agree upon a division of the charges provided for in such schedule, and, in the event of the failure of said railroad companies to agree upon a division and to notify the board of such agreement, the board of railroad commissioners shall, after a hearing of the companies interested, decide the same, taking into consideration the value of terminal facilities and all the circumstances of the haul, and the division so determined by the board shall, in all controversies or suits between the railroad companies interested, be prima facie evidence of a just and reasonable division of such charges.

2080e. Unreasonable charges. 23 G. A., ch. 17, § 5. Every unjust and unreasonable charge for the transportation of freight and cars over two or more railroads in this state is hereby prohibited and declared to be unlawful, and each and every one of the companies making such unreasonable and unlawful charges, or otherwise violating the provisions of this act, shall be punished as provided in chapter twenty-eight of the acts of the Twenty-second General Assembly [§§ 2049–2080] for the making of unreasonable charges for the transportation of freight and cars over a single line of railroad by a single railroad company.

2082. Railroad-aid taxes; limit. 20 G. A., ch. 159, § 2; 24 G. A., ch. 18. Taxes not to exceed five per centum on the assessed value of any township, incorporated town or city may be voted to aid any railroad company which is or may become incorporated under the laws of the state of Iowa, to aid in the construction of a projected railroad within this state as hereinafter provided.

[A substitute for the original section.]

Where a tax was voted in December, 1883, and the law under which it was voted was repealed in April following, and after the voting of the tax the company engaged as actively in the preparation for the work of construction as it could well do at that season of the year, and in the opening of the spring prosecuted its works with energy and complied with the contract on its part, *held*, that the expenditures and work on the faith of the tax voted were sufficient to entitle the company to such tax: *Cantillon v. Dubuque & N. W. R. Co.*, 78–48.

2083. Aid taxes; levy and collection.

Where a proper petition was presented and acted upon at a called meeting of the trustees of which one member had no notice on account of being out of the township, *held*, that the action of the majority was valid: *Young v. Webster City & S. W. R. Co.*, 75–140.

The statute prescribes no time during which the publication shall be made; it is to be done immediately, but the time will depend upon the day of the issue of the paper. The statute does not require the newspaper publication to be made ten days before the election: *Johnson v. Kessler*, 76–411.

A tax-payer cannot restrain the collection

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of taxes voted in aid of the construction of the road on the ground that the company has not complied with the conditions of the notice, and completed the road within the time prescribed: *Ibid.*

When a railroad company expends large sums of money in the construction of its road, tax-payers, before the completion of the road, having made no objection, are estopped to deny the validity of the tax: *Ibid.*

Where the notice specified that the road should be built between a certain city and a point on another road so as to make a continuous line of railroad from said city to certain coal mines of the latter road, *held*, that the construction of a road from the city to the junction with the other road was all that was required: *Young v. Webster City & S. W. R. Co.*, 75–140.

Where the notice does not state to what point the road is to be fully completed before the tax shall become due and payable, it is not sufficient: *Kleise v. Galusha*, 78–310.

Where the articles of a corporation in whose favor a tax was voted specified its objects to be to construct, operate and maintain a railroad from Dubuque in a westerly and northwesterly direction through Iowa, Minnesota and Dakota to a junction with the Northern Pacific, and the road was accordingly constructed, extending from Dubuque to St. Paul, the reaching of the point specified not being a condition of the payment of the tax, *held*, that there was not such failure to comply with conditions as to work a forfeiture: *Cantillon v. Dubuque & N. W. R. Co.*, 78–48.

Without fixing any definite rule for all cases the court *held* (by a majority opinion) that where a tax was voted in December, 1883, it was properly levied on the assessment of that year: *Ibid.*

In an action of *mandamus* to compel a county treasurer to pay over to plaintiff certain taxes collected for its use by his predecessor in office, and transferred by such predecessor to the county fund by order of the board of supervisors, *held*, that the transfer to the county fund was such an appropriation of the money as to release defendant from all liability to plaintiff on account of it: *Minneapolis & St. L. R. Co. v. Becket*, 75–183.

As to the effect of alienation of the road upon the right to a tax, see notes to § 2086.

2084. Notice; conditions; limit of tax. 20 G. A., ch. 159, § 4; 24 G. A., ch. 18. The stipulations and conditions in the notices prescribed in said act, must conform to those set forth in the petition asking the election; and the aggregate amount of tax voted or levied after the passage of this act, under the provisions of said chapter 159 of the acts of the Twentieth General Assembly, as amended by chapter 19 of the acts of the Twenty-third General Assembly [§§ 2081–2089], in any township, incorporated town or city shall not exceed five per centum of the assessed value of the property therein respectively.

[A substitute for the original section.]

2085. Payment by treasurer.

Where money is paid in aid of the construction of railroads, such money in the hands of the treasurer is a trust fund, and the tax-payer and the railroad company are beneficiaries: *Eyerly v. Supervisors of Jasper County*, 77–470.

And where an action was commenced to test the legality of a tax as voted in aid of a railroad, *held*, that while such action was pending, the statute of limitations did not commence to run against an action of *mandamus* to compel the supervisors to refund the money: *Ibid.*

A railroad company entitled to the proceeds of a tax paid into the treasury may recover the amount thereof on the bond of the treasurer to whom the money is paid. The company cannot maintain *mandamus* against the successor of such treasurer, who has never received the money collected: *Cedar Rapids, I. F. & N. R. Co. v. Cowan*, 77–535.

2086. Certificate of taxes exchangeable for stock or bonds. 20 G. A., ch. 159, § 6; 23 G. A., ch. 19, § 1. It shall be the duty of the county treasurer, when required, in addition to a tax receipt to issue to each tax-payer on the payment of any taxes voted under the provisions of this act a certificate showing the amount of tax so paid, the name of the railroad company entitled thereto, and when the same was paid, and the treasurer shall be entitled to charge and receive the sum of twenty-five cents for each certificate so issued. Said certificates are hereby made assignable and when presented by any person holding the legal title thereto to the president, managing director, treasurer or secretary of the railroad company receiving the taxes paid as shown by such certificate, in amount showing the sum of one hundred dollars or more of taxes to have been paid for said railroad company, said railroad company shall issue or cause to be issued to said person the amount of stock of the company desiring the benefit from said taxes to the amount of

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said certificate or certificates, and if the taxes paid as shown by said certificate or certificates amount in the aggregate to more or less than any certain number of shares of stock, then the holder of said certificates shall be entitled to receive the full number of shares of stock covered by said certificates and may make up and tender in money the balance of any share of said stock when the certificates held by him are not equal in amount to one full share of such stock, the stock for such purpose to be estimated at its par value. Whenever it shall be proposed in the petition and notice calling said election to issue first mortgages, bonds, not exceeding the sum of eight thousand dollars per mile for a railroad of three feet gauge and not exceeding the sum of eighteen thousand five hundred dollars per mile for the ordinary four feet eight and one-half inch gauge, in lieu of stock as herein provided, it shall be lawful to issue said bonds of the denomination of one hundred dollars in the same manner as is provided for the issue of stock, and in such case the petition and notice shall state the amount of bonds per mile to be issued, the rate of interest, and the time of payment of the interest and principal of said bonds.

[As amended by changing the limit to which the road may be mortgaged per mile.]

The tax-payer must be held to a knowledge of the law at the time the tax was voted by which (§ 1997) the company has the right to transfer the road, and therefore the obligation of payment by tax-payers will depend upon the readiness of the purchasing company to deliver the stock, where there is a condition in the contract of transfer by which stock in the consolidated line of equal or greater value than that in the company in whose favor the tax is voted is to be issued: *Cantillon v. Dubuque & N. W. R. Co.*, 78-48.

2087. Liability of directors. 20 G. A., ch. 159, § 7; 23 G. A., ch. 19, § 2. The board of directors of any railroad company receiving taxes voted in aid thereof under the provisions of this act, or those members thereof or either of them who shall vote to bond, mortgage, or in any manner incumber said road to an amount exceeding the sum of eight thousand dollars per mile for a railroad of three feet gauge, or exceeding the sum of eighteen thousand five hundred dollars per mile for the ordinary four feet eight and one-half inch gauge, not including in either case any debt for ordinary operating expenses, shall be liable to the stockholders or either of them for double the amount estimated of its par value of the stock by him or her held, if the same should be rendered of less value or lost thereby.

[As amended by changing the limit to which the road may be mortgaged per mile.]

Incumbrances placed on a road prior to the payment of taxes by the tax-payers might be a ground for refusing to pay such taxes, but are not prohibited by this section, which is intended to apply to cases where bonds are issued in excess of the limits named after the company has received taxes voted in its aid, and in which, therefore, the stockholder has no other remedy: *Walker v. Birchard*, 82-888.

2088. Forfeiture of tax.

In a particular case, *held*, that the evidence did not show that tax-payers were induced to sign the petition and to vote for the tax, upon any offer or promise of exemption from payment: *Young v. Webster City & S. W. R. Co.*, 75-140.

Where the county treasurer, having in his hands money paid by the tax-payers under the levy of a railroad-aid tax, disbursed the same in part to the railroad company and in part to a person claiming to be the assignee of such company and then went out of office, *held*, that an action of *mandamus* against the board of supervisors was not the proper remedy, the taxes not having been paid into the county fund nor used by the county: *Eyerly v. Board of Supervisors*, 81-189.

Under a previous statute, *held*, that the provision that taxes remaining in the treasury more than two years after collection should be deemed forfeited was applicable equally in a case where the company had complied with the conditions of the vote, by building its road, as to a case where such taxes remained uncalled for by reason of a failure to perform such conditions: *Cedar Rapids, I. F. & N. W. R. Co. v. Elseffer*, 51 N. W. R., 27.

Held, also, that the courts would not hesitate in upholding such a provision on the ground that it was in the nature of a forfeiture, it not being a forfeiture in the usual signification of that term: *Ibid.*

Also *held*, that under the facts of the case, the company could not be relieved from the provisions of the statute on the ground of a mistake on the part of the officers of the company as to its being entitled to the tax: *Ibid.*

Also *held*, that this provision of the statute was not repealed by a subsequent statute on the same subject: *Ibid.*

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2096. Changing names of stations. 22 G. A., ch. 31, § 1; 24 G. A., ch. 26. In all cases where any railway company shall fail or refuse to make the name of a railway station conform to the name of the incorporated town or unincorporated town regularly laid out and platted within the limits of which it is situated, the railway commissioners of the state, upon hearing and after notice thereof, may order a change in the name of the said station to effect such uniformity in name. Said notice may be served upon the same persons and in the same manner as provided for service upon said railway company of original notice, at least ten days before the date named for hearing.

[As amended to make the provisions applicable to unincorporated towns.]

CHAPTER 6.

TELEGRAPH AND TELEPHONE LINES.

2108. Liability for negligence.

A telegraph company cannot, by contract, excuse itself from liability for negligent failure to transmit a message: *Garrett v. Western U. Tel. Co.*, 49 N. W. R., 88.

Where the company failed to send a message directing that the markets be forwarded to the sender, he being a cattle buyer, *held*, that the company was liable for loss of the sender incurred in the purchase of cattle by reason of not being advised as to the market price: *Ibid*

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TITLE XI.

THE POLICE OF THE STATE.

CHAPTER 1.

SETTLEMENT AND SUPPORT OF THE POOR.

2139. Settlement.

The fact that a minor is emancipated does not enable him to acquire by residence a settlement distinct from that of his father: *Clay County v. Palo Alto County*, 82–626.

2145. County of settlement liable.

The fact that the county furnishing support does so without the claim therefor being approved by the township trustees does not preclude such county from recovering from the county of the settlement: *Clay County v. Palo Alto County*, 82–626.

2152. Application for relief.

In a particular case, *held*, that the application for support made by another in behalf of the person by whom the support was furnished was sufficient: *Clay County v. Palo Alto County*, 82–626.

2153. Expense paid by county.

The provision that bills shall be certified by the township trustees is not a limitation upon the right of the board to allow the claim without such certificate, and in such case, the county paying the claim is not precluded from recovery therefor from the county of the settlement of the poor person: *Clay County v. Palo Alto County*, 82–626.

CHAPTER 2.

THE CARE OF THE INSANE.

2194. Examination by commissioners.

The law contemplates the presence of the person whose insanity is sought to be established in all cases unless upon inquiry it is made to appear that such presence would probably be injurious to the person, or attended with no advantage to him. The fact that the proceeding may be had without the presence of defendant in the cases specified does not render the statute unconstitutional, and it will be assumed that the absence of the person was justified by the facts: *Chavannes v. Priestley*, 80–316.

2195. Finding.

An adjudication by the commissioners of insanity raises at least a presumption of the fact, and such finding may be shown in evidence in a divorce case to establish the fact of insanity: *Tiffany v. Tiffany*, 50 N. W. R., 554.

2196. Appeal.

The actual fact as to insanity may be inquired into on a *habeas corpus* proceeding, and if in such proceeding it is determined that the person is insane, it is not necessary to reinvestigate that question in an appeal from the action of the commissioners: *In re Bresee*, 82–573.

On such appeal the court can take judicial notice of the proceedings in a *habeas corpus* case before a judge of the court and filed in the court as required by law: *Ibid.*

2235. Rules for hospitals. 1432; 22 G. A., ch. 76; 24 G. A., ch. 48. The superintendents of the hospitals and the governor of the state, shall adopt such regulations as they may deem expedient in regard to what patients, or

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class of patients, shall be admitted to and provided for in the respective hospitals, and in regard to transfer of patients from one hospital to another whenever such transfer becomes necessary; or from what portion of the state patients, or certain classes of patients, may be sent to any hospital; and they may change such regulations from time to time as they may deem best; and they shall make such publication of these regulations as they may deem necessary for the information of those interested. The regulations so adopted shall be conformed to by the parties interested. [Same, § 56.]

[As amended by inserting the provision relating to the transfer of patients.]

2236. Liability of estate.

Pension money of an insane person received from the United States, after the taking effect of 20 G. A., ch. 23 (§ 4305), cannot be appropriated to reimburse the county for expenses incurred and paid by the county for the support of such person. Whether such money can be appropriated by an order providing for expenses to be thereafter incurred for the support of such insane person, *quære*: *Fayette County v. Hancock*, 49 N. W. R., 1040.

Neither can pension money received after such act took effect be appropriated for expenses incurred and paid by the county for the support of an insane pensioner before that time: *Ibid.*

The liability of the estate is to the county for what the county has paid in its behalf. There is no relation between the estate and the state, and the statute of limitations commences to run from the time of the payment by the county to the state: *Harrison County v. Dunn*, 51 N. W. R., 155.

Although the board may relieve the estate, the failure to do so will not affect the operation of the statute of limitations: *Ibid.*

2245. Commission of inquiry.

Whether the supreme court could, under any circumstances, under the provisions of this section, appoint a commission to inquire into the sanity of a person confined in the hospital for the insane, *quære*. But, *held*, that where the case before the court was an appeal from the finding of commissioners, no such proceeding was necessary: *In re Bresee*, 82–573.

2247. Habeas corpus.

Where a finding of insanity had been made by the commissioners, and upon *habeas corpus* before the judge of the district court the whole question had been investigated and the insanity of the party determined, *held* that, on appeal from the action of the commissioners, it was not necessary to re-investigate the case, but the action of the judge in the *habeas corpus* proceeding might properly be accepted as conclusive: *In re Bresee*, 82–573.

CHAPTER 3.

DOMESTIC AND OTHER ANIMALS.

2255. Liability of owner.

While trespass is not committed when cattle running at large enter upon uninclosed land in counties where the herd law is not in force, yet the act of herding and pasturing cattle upon such uninclosed land against the consent of the owner will constitute trespass for which the wrong-doer may be liable in damages: *Harrison v. Adamson*, 76–337.

In an action for damages against defendant for having herded his cattle upon plaintiff's uninclosed and unimproved land without plaintiff's consent, it appearing that other persons herded cattle upon the land during the time it was used by defendant, and there being no evidence as to how long the land was so used by defendant, and how many cattle he had herded, and the value of such use, *held*, that any verdict, except for nominal damages, would have been without evidence, and therefore the action of the court in refusing to submit the case to the jury for a verdict, and in directing a verdict for the defendant, would not be reversed on appeal: *Williams v. Brown*, 76–643.

In an action for damages from an animal running at large, it is not necessary to show that the road in which he is at large is a legal highway, but it is sufficient to show that it is open to the public; and an animal loose in such highway is running at large, and if vicious the owner is liable for injuries inflicted by such animal on a person passing by: *Meier v. Shrunk*, 79–17.

The fact that stock is running at large in violation of the provisions of the herd law does not absolutely preclude recovery from a railway company for injuries to such stock, caused by the operation of a train upon sta-

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tion grounds at an unlawful rate of speed: *Story v. Chicago, M. & St. P. R. Co.*, 79–402.

In an action for damages by reason of personal injury to plaintiff by defendant's bull running at large, *held*, that evidence that defendant frequently permitted the animal to run at large in the road was admissible on the question as to whether he was at large with defendant's permission when plaintiff was injured; that evidence as to the character and general reputation of the animal as being vicious was admissible to show whether the attack on plaintiff was without provocation or was due, as claimed by defendant, to plaintiff's negligently provoking the animal, and that plaintiff's information as to the disposition of the animal might be shown to indicate whether he acted negligently: *Meier v. Shrunk*, 79–17.

Whether in such case it was negligent in plaintiff to strike the animal with his cane would depend upon attending circumstances as to his reasonable belief that he would thereby avoid danger: *Ibid.*

2258. Notice.

Where a party distrained a trespassing animal and gave notice to the person who had charge of the animal and the one who owned the farm on which it was usually kept, *held*, that the notice was sufficient to authorize the trustees to assess the damages: *Lyons v. Van Gorder*, 77–600.

A trespassing animal should not be treated as an estray, where the party distraining knows who has charge of the animal and where it is kept, although the owner is unknown: *Ibid.*

2259. Assessment.

Where the assessment of damages caused by a trespassing animal had been filed with the township clerk, but the original could not be found, *held*, that the record of the original made by the township clerk was admissible to prove the award of the trustees: *Lyons v. Van Gorder*, 77–600.

2280a. Fraudulent pedigrees. 24 G. A., ch. 66. Any person or persons, firm, company, or association who shall post or publish or shall cause to be posted or published or shall have recorded in any public record book kept for such purposes any fraudulent pedigree of any horses, cattle, sheep or swine shall be guilty of a misdemeanor and shall upon conviction be fined in a sum of not less than fifty dollars nor more than one hundred dollars for each offence and shall stand committed to the county jail until said fine is paid.

2286. Bounty on wolf and other skins. 1487; 24 G. A., ch. 37, § 1. A bounty shall be allowed on the skin of a wolf, lynx, swift or wild cat, as follows: five dollars on an adult wolf, and two dollars on a cub wolf, and one dollar on a lynx, swift or wild cat; to be paid out of the treasury of the county in which the animal was taken, upon the certified statement of the facts, together with such other evidence as the board of supervisors may demand showing the claimant to be entitled thereto. And any person who shall demand a bounty on any of the above mentioned animals killed, or taken in another state or county, or on a domesticated animal, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not more than one hundred nor less than fifty dollars and cost, and be imprisoned in the county jail till said fine and costs are paid.

[A substitute for the original section.]

2287. Proceedings. 1488; 24 G. A., ch. 37, § 2. The person claiming the bounty shall produce such statement, together with the whole skin of the animal, to the county auditor wherein such wolf, lynx, swift, or wild cat had been taken and killed. And the auditor before whom such skins are produced shall destroy or deface the same so as to prevent their use to obtain for the second time the bounty herein provided.

[A substitute for the original section.]

2293a. Appointment of sheep inspectors. 24 G. A., ch. 49, § 1. The county board of supervisors of any county in the state when notified in writing, by five or more sheep owners of such county, that sheep diseased with scab, or any other malignant, contagious disease exists in such county, shall, at any regular or special meeting, appoint and commission a suitable person, to be known as county sheep inspector, who shall take an oath of office prescribed by the board of supervisors and whose duties shall be as hereinafter

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prescribed, and whose term of office shall be for two years, or until his successor is appointed and qualified.

2293b. Inspection; report. 24 G. A., ch. 49, § 2. It shall be the duty of the county sheep inspector, upon the information of three or more sheep owners that any sheep within his jurisdiction have the scab or any other malignant contagious disease, to immediately inspect and report in writing the result of his inspection to the county auditor of his county to be filed by him for reference by the county board of supervisors, or any party concerned; and if so desired shall command the owner or agent to dip or otherwise treat such diseased sheep, and shall inspect such diseased sheep every month thereafter until such disease shall be cured or otherwise eradicated.

2293c. Owner fined. 24 G. A., ch. 49, § 3. Should such owner or agent fail to comply with the provisions of section two of this act [§ 2293*b*] he or they shall be subject to a fine not to exceed one hundred dollars, and such fine shall be a lien on such sheep and shall be recovered as an action of debt, together with all costs in any court of competent jurisdiction; and it is hereby made the duty of the county board of supervisors and county attorney to prosecute such cases of negligence.

2293d. Expense of treatment. 24 G. A., ch. 49, § 4. It is hereby made the duty of the sheep inspector to dip or otherwise treat such diseased sheep, should the owner or agent refuse to do so, and all costs, expenses or charges together with a per diem of three dollars per day, shall be charged against such sheep, and it shall be a lien on such sheep for such costs, expenses or charges and may be collected together with all costs in any court of competent jurisdiction.

2293e. Payment of costs. 24 G. A., ch. 49, § 5. The compensation of the sheep inspector shall be three dollars per day, and shall be paid by the owner of the sheep, or his agent, if the disease is found to exist. In case no disease is found to exist the complainants shall pay inspector.

2293f. Inspection of new flocks. 24 G. A., ch. 49, § 6. Upon the arrival of any flock of sheep within the state from a distance of more than twenty miles outside the boundaries of the state the owner or agent shall notify the inspector of the county in which such sheep are being held and he shall inspect such flock of sheep at the expense of the owner or his agent, and if the sheep are found sound shall furnish the owner or agent a certificate which shall be a passport to any port of the state; provided, however, that sheep in transport on board of railroad cars, or passing through the state on such cars shall not come within the provisions of this act. Any violation of the provisions of this act by the owner of any sheep shall subject the owner to a fine not to exceed one hundred dollars and shall be a lien and may be collected as in section three of this act [§ 2293*c*]. This act shall be in full force and effect from and after its passage.

CHAPTER 3*b*.

CARE AND PROPAGATION OF FISH.

[Sections 2303-2306 and 2310-2312 (being portions of 16 G. A., ch. 70, and 17 G. A., ch. 80) are repealed by 23 G. A., ch. 34, § 1, *infra*, § 5403*a*, following which are to be found the other sections of that act relating to this subject.]

2319. Fish dams across outlets or inlets of lakes. 21 G. A., ch. 63, § 1; 22 G. A., ch. 108; 24 G. A., ch. 46. Any city or incorporated town which is bounded in whole or in part by any meandered lake or chain of lakes of

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this state, or any board of supervisors of the county in which said lake or chain of lakes is situated is hereby authorized and empowered to construct and maintain across any outlet or inlet of such lake a dam to obstruct the passage of fish. Such dam may be constructed of earth, masonry or other substance to the *heighth* [height] of the natural and ordinary level of the lake, but above such level and across the entire width of the natural outlet it shall be an open net-work of bars, rods, or wire, including however the necessary and proper framework and supports therefor. Said net-work may be constructed to prevent so far as possible the escape of fish from the lake. But nothing herein contained shall be construed to authorize the raising of the ordinary and natural level of the lake or the interfering with any water-power, dwelling-house, out-building, orchard or grove.

[As amended so as to extend the provisions to boards of supervisors and to inlets.]

CHAPTER 4.

FENCES.

2322. Partition fences.

There is no provision in the statute for delivering formal possession of a partition fence, and where a contract with reference to such a fence was made, and the person agreeing to pay for his share thereof adopted and acknowledged the benefits of the fence, *held*, that the contract was sufficiently performed to take it out of the statute of frauds: *Bodell v. Nehls*, 52 N. W. R., 123.

CHAPTER 5.

LOST GOODS.

2350. Stock estray.

A trespassing animal should not be treated as an estray, when the party distraining knows who has charge of the animal and where it is kept, although the owner is unknown: *Lyons v. Van Gorder*, 77–600.

CHAPTER 6.

INTOXICATING LIQUORS.

2359. Manufacturing, selling or keeping for sale prohibited.

No one not holding a permit has any right to sell or dispense intoxicating liquors for any purpose, and physicians are not excepted, though selling as a medicine in good faith and according to the needs of their patients: *State v. Benadom*, 79–90.

It is not necessary that the liquors be kept in a building for the purpose of unlawful sale in and from it, in order to constitute the offense described, but a keeping with intent of illegal sale elsewhere within the state will be sufficient: *State v. Viers*, 82–397.

A state has no power to prohibit the sale of intoxicating liquors, sold by the importer in the original packages in which they are brought into the state (overruling *Collins v. Hills*, 77–181; *Grousendorf v. Howat*, 77–187; *Leisey v. Hardin*, 78–286; *State v. Zimmerman*, 78–614; *State v. Bowman*, 79–556): *State v. Caldwell*, 81–759; *Leisey v. Hardin*, 135 U. S., 100.

Under the facts in a particular case, *held*, that bottles of liquor constituted original packages: *State v. Coonan*, 82–400.

In a particular case, *held*, that a barrel of liquor addressed to defendant, being transported for delivery by a carrier, was an original package: *State v. Corrick*, 82–451.

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Where liquors were sold in bottles, which were opened by the purchasers, the contents being drunk on the premises, *held*, that this was not a sale in original packages: *Stommel v. Timbrel*, 51 N. W. R., 159.

Where it appeared that defendant had liquor brought into the state in bottles, and sold it by the bottle to customers, who opened and drank it on the premises, *held*, that the case was not one of selling in original packages, but of keeping a saloon, and defendant was properly convicted: *Hopkins v. Lewis*, 51 N. W. R., 255.

The decision in *Leisey v. Hardin*, 135 U. S., 100, did not declare the state prohibitory law valid *in toto*, and upon the passage of the Wilson Bill it became effectual, without re-enactment, as applied to liquors sold in original packages: *In re Spickler*, 43 Fed. R., 653. And see *In re Rahrer*, 140 U. S., 545.

The effect of the statute is to prohibit manufacture of intoxicating liquors for sale outside the state. And in this respect it is not unconstitutional as a regulation of interstate commerce: *Kidd v. Pearson*, 128 U. S., 1.

The state may prohibit or restrict the manufacture of intoxicating liquors within her limits and prohibit all sale and traffic in them within the state, without abridging the liberties or immunities of citizens of the United States or depriving any person of property without due process of law: *Ibid.*

2359a. Repeal. 23 G. A., ch. 35, § 1. Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 of chapter 71 laws of the Twenty-second General Assembly [§§ 2360–2379], are hereby repealed, and the following enacted in lieu thereof.

2359b. Permits required. 23 G. A., ch. 35, § 2. After this act takes effect no person shall manufacture for sale, sell, keep for sale, give away, exchange, barter or dispense any intoxicating liquor, for any purpose whatever, otherwise than is provided in this act. Persons holding permits, as herein provided, shall be authorized to sell and dispense intoxicating liquors for pharmaceutical and medical purposes, and alcohol for specified chemical mechanical purposes, and wine for sacramental purposes and to sell to registered pharmacists and manufacturers of proprietary medicines, for use in compounding medicines, and to permit-holders for use and resale by them, for the purposes authorized by this act, but for no other purposes whatever; and all permits must be procured, as hereinafter provided, from the district court of the proper county at any term thereof after this act takes effect, and a permit to buy and sell intoxicating liquors, when so procured shall continue in force until revoked according to law. Provided further that this section shall not be construed to prevent licensed physicians from dispensing in good faith such liquors as medicine to patients actually sick and under their treatment at the time of such dispensing. Provided further that in case of death or other disability of any registered pharmacist the administrator guardian or legal representative of such pharmacist may continue such business subject to the provisions of this act through the agency of any reputable registered pharmacist conditioned upon their being first obtained the approval of the district court or clerk thereof. Provided further that before entering upon such duties such party or person shall file with the clerk of said court a bond as herein provided to be approved by the clerk of said court.

2359c. Notice of application. 23 G. A., ch. 35, § 3. Notice of an application for a permit must be published for three consecutive weeks in a newspaper regularly published and printed in the English language, and of general circulation in the city or town where the applicant proposes to keep and sell intoxicating liquors, or if there be no newspaper regularly published in such city or town such publication shall be made in one of the official papers of the county, the last of which publication shall be not less than ten days nor more than twenty days before the first day of the term; and state the name of the applicant, with the firm name under which he is doing business, the purpose of the application, the particular location of the place where the applicant proposes to keep and sell liquors, and that the petition provided for in the next section, will be on file in the clerk's office, at least ten days before the first day of the term, naming it, when the application will be made, and a copy thereof shall be served personally upon the county attorney in

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the same manner and time as required for service of original notices in the district court.

2359d. Petition. 23 G. A., ch. 35, § 4. Applications for permits shall be made by petition signed and sworn to by the applicant and filed in the office of the clerk of the district court of the proper county at least ten days before the first day of the term, which petition shall state the applicant's name, place of residence, in what business he is then engaged, and in what business he has been engaged for two years previous to filing the petition; the place, particularly describing it, where the business of buying and selling liquor is to be conducted; that he is a citizen of the United States and of the state of Iowa; that he is a registered pharmacist and now is, and for the last six months has been lawfully conducting a pharmacy in the township or town wherein he proposes to sell intoxicating liquors under the permit applied for, and as the proprietor of such pharmacy, that he has not been adjudged guilty of violating the law relating to intoxicating liquors within the last year next preceding his application; and is not the keeper of a hotel, eating house, saloon, restaurant or place of public amusement; that he is not addicted to the use of intoxicating liquors as a beverage and that he desires a permit to purchase, keep and sell such liquors for lawful purposes only. And every applicant who has at any time taken out a permit under this act which said permit has been revoked shall if he again apply for a permit, file with such application the further statement under oath, that he has not within the last two years next preceding his application, been knowingly engaged, employed or interested in the unlawful manufacture, sale or keeping for sale of intoxicating liquors. *Provided further*, when a pharmacist has procured a permit, and by reason of the expiration of his lease, or for any other good reason he desires to change his locality to another place in the same township, town, or ward, the court may grant to him on his petition, the right to continue business under his permit in the same township, town or ward, in which the permit is granted.

2359e. Bond; oath; terms of permit. 23 G. A., ch. 35, § 5. This permit shall issue only on condition that the applicant shall execute to the state of Iowa a bond in the penal sum of one thousand dollars with good and sufficient sureties to be approved by the clerk of the court, conditioned that he will well and truly observe and obey the laws of Iowa, now or hereafter in force, in relation to the sale of intoxicating liquors, that he will pay all fines, penalties, damages and costs that may be assessed or recovered against him for a violation of such laws during the term for which said permit is granted. The said bond shall be deposited with the county auditor, and suit shall be brought thereon at any time by the county attorney, or any person for whose benefit the same is given, and in case the conditions thereof or any of them shall be violated, the principals and sureties therein, shall be jointly and severally liable for all civil damages, costs and judgments, that may be obtained against the principal in any civil action brought by a wife, child, parent, guardian, employer or other person, under the provisions of section fifteen hundred and fifty-six, fifteen hundred and fifty-seven and fifteen hundred and fifty-eight of the Code of Iowa [§§ 2417–2419] as the same is amended and now in force, and section twelve, chapter sixty-six, acts of the Twenty-first General Assembly of the state of Iowa [§ 2419]. The clear proceeds of all other money collected for breaches of such bond shall go to the school fund of the county. Said bond shall be approved by the clerk of the district court under the rules and laws applicable to the approval of official bonds. If at any time the sureties or any of them on said bond shall become insolvent or be deemed insufficient by the clerk of the district court said clerk shall require a new bond to be executed within a time to be fixed by him, and a failure of the person holding such permit to execute such new and sufficient

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bond within the time fixed by said clerk therefor shall cause said permit to become null and void. If the application for the permit is granted it shall not issue until the applicant shall make and subscribe an oath before the clerk, which shall be indorsed upon the bond to the effect and tenor following:

"I —— ——, do solemnly swear (or affirm) that I will well and truly perform all and singular the conditions of the within bond, and keep and perform the trust confided in me to purchase, keep and sell intoxicating liquors. I will not sell, give or furnish to any person any intoxicating liquors otherwise than as provided by law, and, especially, I will not sell or furnish any intoxicating liquors to any person who is not known to me personally, or duly identified; nor to any minor, intoxicated person or persons who are in the habit of becoming intoxicated; and I will make true, full and accurate returns of all certificates and requests made to or received by me as required by law; and said returns shall show every sale and delivery of such liquors, made by or for me during the months embraced therein, and the true signature to every request received and granted; and such returns shall show all the intoxicating liquors sold or delivered to any and every person as returned."

Upon taking said oath and filing bond as hereinbefore provided, the clerk shall issue to him a permit authorizing him to keep and sell intoxicating liquors as in this act provided; and every permit so granted, shall specify the building, giving the street and number, or location in which intoxicating liquors may be sold by virtue of the same, and the length of time the same shall be in force.

Under the previous act, *held*, that the law did not require the bond to specify the purposes for which the permit should authorize liquors to be sold, nor the place of sale: and the fact that the bond was altered by inserting words indicating such purpose and place would not constitute a material alteration, such as to relieve the surety from liability: *Starr v. Blatner*, 76–356.

2359f. Hearing remonstrances. 23 G. A., ch. 35, § 6. No application for a permit shall be considered or acted upon by the court until the requisite notice has been given and petition filed as provided by this act and each is in form and substance such as required. On the first day of the term, having ascertained that the application is properly presented the court shall proceed to hear the application, unless objection thereto be made, in which case the court shall appoint a day during the term, but not later, when the same shall be heard; and in doing so shall consider the convenience of the court, and the interested parties and their council so far as the state of the business and the necessities of the case will permit. If unavoidable causes prevent a hearing during the regular time allotted to the term, the same shall be heard and disposed of in vacation by the judge as soon as practicable thereafter. The county attorney or other council or any five citizens may in person or by council appear and resist the application. Any remonstrance or objection thereto must be in writing and filed on or before noon of the first day of the said term or by such later time as may be fixed by the court, and before the date fixed for hearing and such remonstrance shall state specifically the objection thereto. And whether resisted or objection be made or not the court shall not grant the permit until it shall first be made to appear by competent evidence that the applicant is possessed of the character and qualifications requisite, is worthy of confidence and to receive the trust and will be likely to execute the same with fidelity; and that the statements made in his application are all and singular true, and, considering the population of the locality and the reasonable necessities and convenience of the people such permit is proper. If the application is resisted the court or judge shall hear controversy upon the petitions, remonstrances and objections, and the evidence offered and grant or refuse such permit, as the public good may require. If there be more than one permit applied for in the same locality they shall all be heard at the same

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time, unless for good cause otherwise directed, and the court may grant or refuse any or all of the applications as will best subserve the public interest.

2359g. Suspension or revocation. 23 G. A., ch. 35, § 7. Permits granted under this act shall be deemed trusts reposed in the recipients thereof, and may be revoked upon sufficient showing, by order of the court or judge thereof. Complaint may be presented at any time to the district court, or one of the judges thereof, which shall be in writing and signed and sworn to by three citizens of the county in which the permit was granted, and a copy of such complaint shall, with a notice in writing of the time and place of hearing be served on the accused, five days before the hearing, and if the complaint is sufficient, and the accused appear and deny the same, the court or judge shall proceed without delay, unless continued for cause to hear and determine the controversy, but if continued or appealed at the instance of the permit-holder, his permit to buy and sell liquors may in the discretion of the court be suspended pending the controversy. The complainant and accused may be heard in person or by council or both, and submit such proofs as may be offered by the parties; and if it shall appear upon such hearing, that the accused has in any way abused the trust or that liquors are sold by the accused or his employees in violation of law or if it shall appear that any liquor has been sold or dispensed unlawfully or has been unlawfully obtained at said place from the holder of the permit or any employee assisting therein, or that he has in any proceeding civil or criminal, since receiving his permit, been adjudged guilty of violating any of the provisions of this act or the acts for the suppression of intemperance, the court or judge shall by order revoke and set aside the permit; the papers and order in such case shall be immediately returned to and filed by the clerk of the court, if heard by the judge and the order entered of record as if made in court, and if in this or any other proceeding, civil or criminal, it shall be adjudged by the court or judge that any registered pharmacist, proprietor or clerk who has been guilty of violating this act or the act for the suppression of intemperance and amendments thereto, by unlawfully manufacturing, selling, giving away or unlawfully keeping with intent to sell intoxicating liquors, such adjudication may in the discretion of the commissioners of pharmacy, if such violations are thereafter repeated, work a forfeiture of his certificate of registration. It shall be the duty of the clerk to forward to the commissioners of pharmacy such transcripts without charge therefor, as soon as practicable after final judgment or order.

2359h. To persons not pharmacists. 23 G. A., ch. 35, § 8. Registered pharmacists who show themselves to be fit persons and who comply with all the requirements of this act, may be granted permits, and in any township where there is a registered pharmacist conducting a pharmacy and no pharmacist obtains a permit, if found necessary the court may grant a permit to one discreet person in such township not a pharmacist, but having all other qualifications requisite under this act, upon like notice and proceeding as pertain to permitted pharmacists and subject to the same liabilities, duties, obligations and penalties.

2359i. Record; costs. 23 G. A., ch. 35, § 9. The clerk of the court granting the permit shall preserve as a part of the record and files of his office all petitions, bonds and other papers pertaining to the granting or revocation of permits and keep suitable books in which bonds and permits shall be recorded. The books shall be furnished by the county like other public records. Whether said permit be granted or refused the applicant shall pay the costs incurred in the case, and when granted he shall make payment before any permit issue, except the court may tax the cost of any witnesses summoned by private persons resisting said application, and the fees for serving such subpœnas to such persons when it is shown that such witnesses were sum-

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moned maliciously, or without probable cause to believe their evidence material. A fee of one dollar and fifty cents shall be taxed for the filing of the petition and one dollar for entering the order of the court approving bond and granting said application, and witnesses shall be entitled to mileage and per diem as in other cases. And fees for serving notices and subpœnas shall be the same as in other cases in the district court.

2359j. Request. 23 G. A., ch. 35, § 10. Before selling or delivering any intoxicating liquors to any person, a request must be printed or written, dated of the true date, stating the applicant is not a minor, and the residence of the signer, for whom and whose use the liquor is required, the amount and kind required, the actual purpose for which the request is made and for what use desired, and his or her true name and residence, and, where numbered, by street and number, if in a city, and that neither the applicant nor the person for whose use requested habitually uses intoxicating liquors as a beverage, and the request shall be signed by the applicant by his own true name and signature, and attested by the permit-holder who receives and fills the request by his own true name and signature in his own handwriting. But the request shall be refused, notwithstanding the statement made, unless the permit-holder has reason to believe said statement to be true, and in no case unless the permit-holder filling it personally knows the person applying, that he is not a minor, that he is not intoxicated, and that he is not in the habit of using intoxicating liquors as a beverage; or, if the applicant is not so personally known to the permit-holder, before filling the said order or delivering the liquor he shall require identification, and the statement of a reliable and trustworthy person, of good character and habits, known personally to him, that the applicant is not a minor, and is not in the habit of using intoxicating liquors as a beverage, and is worthy of credit as to the truthfulness of the statements in the application, and this statement shall be signed by the witness in his own true name and handwriting, stating his residence correctly.

2359k. Returns; oath; account of purchases and sales. 23 G. A., ch. 35, § 11. On or before the 15th of January, March, May, July, September, and November of each year each permit-holder shall make full returns to the county auditor of all requests filled by him and his clerks during the two preceding months and accompany the same with a written or printed oath duly taken and subscribed before the county auditor or notary public, which shall be in the following form, to-wit:

"I —— ——, being duly sworn, on oath state that the requests for liquors herewith returned are all that were received and filled at my pharmacy (or place of business) under my permit during the months of ———, 18—; that I have carefully preserved the same and that they were filled up, signed and attested at the date shown thereon, as provided by law; that said requests were filled by delivering the quantity and kind of liquors required and that no liquors have been sold or dispensed under color of my permit during said months except as shown by the requests herewith returned and that I have faithfully observed and complied with the conditions of my bond and oath taken by me thereon indorsed and with all the laws relating to any duties in the premises."

Every permit-holder shall keep strict account of all liquors purchased or procured by him in a book kept for that purpose which shall be subject at all times to the inspection of the commissioners of pharmacy and the county attorney, any grand juror, sheriff or justice of the peace of the county and such book shall show of whom such liquors were purchased or procured, the amount and kind of liquors purchased or procured, the date of receipt and amount sold, also the amount on hand of each kind for each two months. Such book shall be produced by the party keeping the same, to be used as evidence

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on the trial of any prosecution against him or against liquors alleged to have been seized from him or his house, on notice duly served that the same will be required as evidence; and at the same time he returns requests to the county auditor he shall file a statement of such account with such auditor except that the items of sales need not be embraced therein, but the aggregate amount of each kind shall be, and such statement shall be verified, before the county auditor or a notary public. All forms necessary to carry out the provisions of this act not otherwise provided for shall be as may be provided by the commissioners of pharmacy.

Applications for the purchase of liquor produced by the county auditor and signed by the person to whom it is claimed the illegal sales were made. and addressed to defendant, *held* admissible in a particular case, although not accompanied with the sworn certificate of the defendant: *State ex rel. v. Oeder*, 80-72.

Certificates on which sales of liquors by a pharmacist have been made are admissible in evidence even hough they are not shown to be public records, when they are identified by the witness as certificates on which liquors have been purchased from defendant. They constitute evidence in the nature of admissions by defendant that he made the sales of which they purport to be certificates: *State v. Huff*, 76-200; *State v. Cummins*, 76-133.

2359l. Penalties; evidence; several violations. 23 G. A., ch. 35, § 12. Every permit-holder or his clerk under this act, shall be subject to all the penalties, forfeitures and judgments and may be prosecuted by all the proceedings and actions criminal and civil, and whether at law or in equity provided for or authorized by the laws now or hereinafter in force for any violation of this act, and the act for the suppression of intemperance and any law regulating the sale of intoxicating liquors and by any or all of such proceedings applicable to complaints against such permit-holder; and the permit shall not shield any person who abuses the trust imposed by it or violates the laws aforesaid, and in case of conviction in any proceeding civil or criminal all the liquors in possession of the permit-holder may by order of the court be destroyed. On the trial of any action or proceeding against any person for manufacturing, selling, giving away or keeping with intent to sell intoxicating liquors in violation of law, or for any failure to comply with the conditions or dnties imposed by this act, the requests for liquors and returns made to the auditor as herein required, the quantity and kinds of liquors sold or kept, purchased or disposed of, the purpose for which liquors were obtained by or from him and for which they were used, the character and habits of sobriety or otherwise, shall be competent evidence and may be considered so far as applicable to the particular case with any other recognized, competent and material facts and circumstances bearing on the issues involved in determining the ultimate facts. In any suit, prosecution or proceeding for violations of this act or the acts for the suppression of intemperance, and acts amendatory thereof, the court may compel the production in evidence of any books or papers required by this act to be kept, and may compel any permit-holder, his clerk or any person who has purchased liquors of either of them to appear and give evidence, and the claim that any such testimony or evidence will tend to criminate the person giving such evidence shall not excuse such person or witness from testifying or producing such books or papers in evidence; but such oral evidence shall not be used against such person or witness, on the trial of any criminal proceeding against him. Any number of distinct violations of this act may be charged in one indictment or information in different counts and all tried in the same action, the jury specifying the counts, if any, on which the defendant is found guilty.

Where a party who was a registered pharmacist was convicted of keeping a nuisance by the unlawful sale of intoxicating liquors, and a fine of one thousand dollars imposed, and where there was evidence of sales, but none that such sales were unlawful, *held*, that the statute did not require the highest penalty to be fixed in such cases; and *held* also, that the evidence was not sufficient to justify the finding that defendant had abused his trust: *State v. Hoagland*, 77-135.

Evidence in a particular case as to sales to a

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person in the habit of becoming intoxicated, *held* sufficient to identify the sales as made to such person and to warrant a conviction: *State ex rel. v. Oeder*, 80–72.

It is for the jury to say whether the taking of applications, showing that the purchaser desires the liquor for a lawful purpose, is evidence tending to show proper care and caution on the part of the seller, and the disposition to obey the law: *State v. Aulman*, 76–624.

It is proper to instruct the jury that in deciding whether sales under a permit are lawful, they may take into consideration the habits of the purchasers as to the use of liquors as a beverage as known to the seller, and the business or condition of the purchaser as known to the seller. In a particular case, *held*, that there was evidence to justify the finding of the jury that the defendant knew that sales of liquor made by him were not for a lawful purpose: *Ibid.*

By 18 G. A., ch. 75, § 8 (now repealed), the right to sell liquor under permit was limited to registered pharmacists: *Ibid.*

2359m. Purchases for compounding. 23 G. A., ch. 35, § 13. Registered pharmacists, conducting pharmacies and not holding permits, and manufacturers of proprietary medicines are hereby authorized to purchase of permit-holders intoxicating liquors (not including malt) for the purpose of compounding medicines, tinctures and extracts that cannot be used as a beverage. Such purchasers shall keep a record of uses to which the same are devoted, giving the kind and quantity so used.

And on or before the 15th day of January, March, May, July, September, and November of each year they shall make and file with the county auditor sworn reports for the two preceding calendar months, giving full and true statements of the quantity and kinds of such liquors purchased and used, the uses to which the same have been devoted. The commissioners of pharmacy are hereby empowered to make such further rules and regulations with respect to the purchase, use and keeping of such liquors as they may deem proper for the prevention of the abuses of the trusts reposed in such purchasers, and if the said registered pharmacist sell, barter, give away, exchange or in any manner dispose of said liquors, or use the same for any purpose other than authorized in this section he shall, upon conviction before any district court thereof, be liable to all the penalties, prosecutions and proceedings at law or in equity provided against persons selling without a permit, and upon any such conviction the clerk of the district court shall within ten days after said judgment or order transmit to the commissioners of pharmacy the certified record thereof, upon receipt of which the commission may strike his name from the list of pharmacists and cancel his certificate. Provided, that nothing herein contained shall be construed to authorize the manufacture or sale of any preparation or compound under any name, form or device, which may be used as a beverage and which is intoxicating in its character.

2359n. Transportation by carriers. 23 G. A., ch. 35, § 14. Every permit-holder is hereby authorized to ship to registered pharmacists and manufacturers of proprietary medicines, intoxicating liquors to be used by them for the purposes authorized by this act. And all railway, transportation and express companies, and other common carriers are authorized to receive and transport the same upon presentation of a certificate from the clerk of the district court of the county where the permit-holder resides, that such person is permitted to ship intoxicating liquors, under the provision of this act.

2359o. Liability for acts of clerk. 23 G. A., ch. 35, § 15. A permit-holder may employ one or more registered pharmacists as clerks, to sell intoxicating liquors in conformity to the permit and provisions of this act, but in such case the acts of his clerks in conducting the business shall be deemed the acts of the permit-holder who shall be liable therefor as if he had personally done the acts, and in making returns the verification of such requests as may have been received, attested and filled by a clerk must be made by such clerk, and the clerk who transacted any of the business under the permit must join in the general oath required of the employer so far as relates to his own connection therewith. If for any cause a registered pharmacist who holds a

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permit shall cease to hold a valid and subsisting certificate of registration or renewal thereof his permit shall thereby be forfeited and be null and void.

2359p. Old permits expire. 23 G. A., ch. 35, § 16. Any person holding a permit in force when this act takes effect may continue to purchase, keep and sell intoxicating liquors (according to law) for the time provided in such permit, unless sooner revoked. But all such permits shall expire not later than January 1st, 1891.

2359q. Fines; revocation of pharmacists' certificates. 23 G. A., ch. 35, § 17. If any person shall be convicted of violating any of the provisions of this act or acts regulating the practice of pharmacy or any acts for the suppression of intemperance, or amendments thereto by reason of a prosecution by the commissioners of pharmacy, the clear proceeds of all fines so imposed and collected shall be paid into the county treasury of the proper county for the use of the school fund, and the commissioners of pharmacy shall be entitled to draw from the said treasury an amount not exceeding fifty per cent. of the amount of the fines so collected, to be used solely in prosecutions instituted by them for failure to comply with the provisions of this act or of the acts regulating the practice of pharmacy. And the court or clerk thereof before whom any prosecution is instituted and prosecuted by the commissioners of pharmacy shall certify to the auditor of state all cases in which they have appeared as prosecutors, either in person or by their attorney, and the amount of fines imposed and collected in such cases. And the commissioners of pharmacy shall have the power to revoke the certificate of registration of pharmacists for repeated violation of this act. Said amount to be drawn from time to time upon the warrants of the state auditor, which shall issue for the payment of expenses actually incurred in said prosecution after said expenses shall have been audited by the executive council.

2359r. False statements. 23 G. A., ch. 35, § 18. If any person shall make any false or fictitious signature or sign any name other than his or her own to any paper required to be signed by this act or make any false statement in any paper or application signed to procure liquors under this act, the person so offending shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than twenty dollars nor more than one hundred dollars and cost of prosecution, and shall be committed until said fine and costs are paid, or be imprisoned not less than ten nor more than thirty days. If any permit-holder or his clerk shall make false oath touching any matter required to be sworn to under the provisions of this act, the person so offending shall upon conviction thereof be punished as provided by law for perjury. If any person holding a permit under this law shall purchase or procure any intoxicating liquor otherwise than authorized by this act, or make any false return to the county auditor, or use any request for liquors for more than one sale, in any of such cases he shall be deemed guilty of a misdemeanor, and upon conviction punished accordingly.

2359s. Proceedings pending. 23 G. A., ch. 35, § 19. Nothing in this act shall be construed to abate any action or proceeding now pending in any court in this state for a violation of the provisions of the sections hereby repealed, or to operate to bar any prosecutions hereafter brought for any such violations committed prior to the passage and taking effect of this act.

2359t. Superior courts. 23 G. A., ch. 35, § 20. The superior courts of this state and the judges and clerks thereof shall have and exercise the same powers and duties as are in this act specified for district courts their judges and clerks as to granting and revoking permits.

[Sections 2360–2379 (22 G. A., ch. 71) are repealed by 23 G. A., ch. 35, § 1, *supra*, § 2359a.]

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2380. Recovery of penalty by informer.

Where action is brought to recover the penalty for breach of the bond, and such action is settled, the informer is entitled to a share of the proceeds in the same way as though the action had proceeded to judgment: *Hull v. Welsh*, 82–117.

The provisions as to penalty are applicable to an action on the bond of a pharmacist for the illegal sale of liquors: *Ibid.*

2381. Selling without permit; liability of agent.

The provision of this section does not make an agent liable under § 2407 for money paid for intoxicating liquors, sold in violation of law, where the agent does not actually receive such money or purchase price: *Schober v. Rosenfield*, 75–455.

An agent who solicits orders for intoxicating liquors in one county, subject to the approval of his principal in another county, is subject to prosecution for illegal sales, although such sales are not complete, and regardless of whether or not the principal holds a permit: *State v. Kriechbaum*, 81–633.

Where a registered pharmacist was convicted of keeping a nuisance, and it appeared that he held a permit under a statute authorizing registered pharmacists to sell intoxicating liquors for medicines only, without having obtained a permit from the board of supervisors, *held*, that sales for any other purpose were forbidden and punishable under this section: *State v. Salts*, 77–193.

Where an information for selling intoxicating liquors contained several counts and defendant was tried before a justice of the peace and found guilty on the first count, *held*, that by legal inference he was acquitted on the other counts, and upon an appeal to the district court could only be tried on the first count: *State v. Severson*, 79–750.

2383. Illegal keeping.

Since the passage of the prohibitory liquor law cities have no power to pass laws regulating the business of keeping saloons for the sale of intoxicating liquors, but they may regulate saloons kept for other purposes: *Clinton v. Grusendorf*, 80–117.

2384. Nuisance.

Prosecutions: The use of a building for the purpose of selling intoxicating liquors is an indictable offense under this section, and an indictment may be found for the first offense, and the district court will therefore have jurisdiction of the case: *State v. Adams*, 81–595.

The provisions of § 5543 as to public offenses committed within five hundred yards of the boundary line of adjoining counties are applicable to this offense: *State v. Rockwell*, 82–429.

To constitute the crime of nuisance in unlawfully keeping for sale and selling intoxicating liquors, the existence of intoxicating liquors in the place described is essential; but where there was no question on the trial that liquors were thus kept, *held*, that an instruction was not erroneous which did not call the attention of the jury to the necessity of proving that fact: *State v. Shank*, 79–47.

To constitute an offense under this section, it is not necessary that the intent be to sell in and from the building where kept. But a keeping for illegal sale elsewhere within the state will be sufficient. If one house is used for the sale of liquors which are kept in another, both are nuisances: *State v. Viers*, 82–397.

Where the indictment charged that the nuisance consisted in keeping a place for the illegal sale of liquors consisting of a three-story brick building, and the proof showed that the three-story part on the first floor was used as a cigar stand and restaurant, while the one-story addition used in connection with the three-story part as a kitchen was the place where the liquors were kept, *held*, that there was not a fatal variance between the allegations and the evidence: *State v. Gurlagh*, 76–141.

In a prosecution for maintaining a saloon nuisance, it appearing that defendant illegally kept for sale and sold intoxicating liquors at his place of business, *held*, that evidence of finding intoxicating liquors on other premises where defendant resided with his father was admissible: *State v. Illsley*, 81–49.

One holding a permit, but selling for unlawful purposes, is subject to punishment under this section: *State v. Webber*, 76–686.

Pharmacists: In an action to enjoin a liquor nuisance, where it was shown that defendant, a registered pharmacist, had made illegal sales himself, and that as a man possessed of ordinary intelligence and business tact he must have known that his clerk had made illegal sales, *held*, that the fact that the clerk who had made the sales was discharged a few weeks before the commencement of the suit to enjoin the nuisance, when no other change in the business was shown, would not defeat the action on the ground that no nuisance existed when it was commenced: *Elwood v. Price*, 75–228.

Where a witness testifies that he purchased liquor of a registered pharmacist, the state should be allowed to interrogate him further as to the object for which the purchase was made, and inquire into the facts for the purpose of showing that the alleged object was a mere pretense, and that the seller knew or had grounds for knowing that fact: *State v. Cummins*, 76–133.

It is for the jury to determine, in a prosecution against a pharmacist for illegal sales, whether from the frequency of sales to the same persons, and from the appearance of the persons to whom the sales were made, and from the fact as to whether the sales were with or without a prescription of a physician, it appears the sales were or were not for the

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actual necessities of medicine: *State v. Huff*, 76–200.

Where defendant was indicted and convicted for keeping a nuisance, and it appeared that he held a certificate as pharmacist and a valid permit to sell intoxicating liquors for lawful purposes, and where there was no evidence tending to establish unlawful sales, *held*, that the verdict should have been set aside upon defendant's motion: *State v. Flusche*, 79–765.

Purpose: One having no authority to sell to any person for any purpose cannot show by way of justification that the liquors were sold for an innocent purpose. The allegation in an indictment of sales "as a beverage" *held* to be surplusage so far as the purpose was stated: *Craig v. Plunket*, 82–474.

Indictment: The statute which prohibits the sale of beer and the keeping of that liquor for sale did not take effect until July 4, 1884, and where an instruction stated that defendant might be convicted if the evidence showed that he maintained a nuisance within three years before the finding of the indictment March 24, 1887, *held*, that it was erroneous as permitting a conviction of defendant on proof that he did an act which was not prohibited by law when done: *State v. Jacobs*, 75–247.

Where an indictment charged the keeping of a certain building as a nuisance on a certain date and on divers other days and times between that date and the finding of the indictment, and then stated that "the building *is* situated in Franklin county, Iowa," *held*, that the indictment alleged with sufficient certainty that the offense was committed in Franklin county: *Ibid.*

An indictment for maintaining a nuisance which charged that defendant did unlawfully establish, keep, use and maintain a certain building and place in which he owned and kept intoxicating liquor with intent to sell and give the same away in violation of law, and did at the aforesaid times and place so unlawfully sell and give away such intoxicating liquor, *held* to sufficiently charge the keeping of the place in which the forbidden acts were done: *State v. Price*, 75–243.

Where two indictments were returned for the crime of nuisance as here described, one for maintaining such nuisance prior to the date of the taking effect of the act of the Twenty-first General Assembly amending this section, and the other for a time subsequent to such amendment, *held*, that an acquittal under an indictment for the time subsequent to the taking effect of the statute would not bar a prosecution under the other indictment: *State v. Webber*, 76–686.

Instructions: An instruction which stated to the jury that "under the law of this state, any person who, without a permit, sells intoxicating liquors in a building or place, or keeps intoxicating liquors in such place with intent to sell the same, is guilty of a nuisance," *held* not to state the law accurately, as it is the keeping of the place, rather than the doing of the acts, which constitutes the offense; but in view of the evidence and other instructions, the jury could not have been misled, and defendant was in no manner prejudiced by the instruction: *State v. Price*, 75–243.

Evidence: Certificates on which sales of liquors by a pharmacist have been made are admissible in evidence, even though they are not shown to be public records, when they are identified by the witnesses as certificates on which they purchased liquors from defendant. They constitute evidence in the nature of admissions by defendant that he made the sales of which they purport to be certificates: *State v. Huff*, 76-200; *State v. Cummins*, 76–133.

In such case the burden is on defendant to show that such sales are legal: *State v. Cummins*, 76–133.

In an action to enjoin a nuisance where the testimony showed that defendant kept a public eating-house and restaurant, that he paid an internal revenue tax as a retail liquor dealer, and that the reputation of his place was that of a place where intoxicants were kept and sold, *held*, that the evidence as to actual sales, added to the presumptions which arise under the statute from these facts, fully established the allegations of the petition, and an injunction should issue and judgment for costs and an attorney's fee: *State v. Matheison*, 77–485.

For the purpose of showing whether sales under a permit have been illegal, the extent of the business done cannot be taken into account: *Craig v. Werthmueller*, 78–598.

It is illegal to manufacture without a permit for export out of the state: *Ibid.*

In a prosecution for maintaining a nuisance by selling and keeping with intent to sell intoxicating liquors in a blacksmith shop, *held*, that the fact that defendant was there receiving money and giving orders for liquors to be delivered elsewhere would show that he was selling intoxicating liquors and using the shop for that purpose, that being the place where the business was transacted, and an instruction directing the jury that they might consider such facts as evidence tending to show the offense as charged was not erroneous: *State v. Briggs*, 81–585.

An instruction that in such case it was unlawful to give away any intoxicating liquor to be used as a beverage, *held* erroneous: *Ibid.*

Evidence that liquors seized at a time prior to the finding of the indictment were restored by the officer, *held* not admissible, it not appearing that the violation of the law charged in connection with the prior seizure was the same as that charged in the indictment: *State v. Zimmerman*, 78–614.

The right to transport liquor into the state under the constitutional provisions as to interstate commerce does not extend to the sale in the state for illegal purposes: *Ibid.*

The mere fact that the only evidence showing the illegal keeping for sale and selling of intoxicating liquors is the uncorroborated testimony of a witness employed and paid for procuring evidence, and who is by reason of a stipulation of the parties not put on the stand and subjected to cross-examination, will not justify the court in refusing to grant an injunction, the evidence of such witness not being contradicted nor impeached: *Dickinson v. Bentley*, 80–482.

The fact that a witness in a prosecution for

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illegal keeping and selling of intoxicating liquors testifies to having bought liquor of defendant does not necessarily prevent an injunction being granted on his evidence alone. If the witness had induced the defendant to do the acts which rendered his place a nuisance, with a view to prosecution, the case might be different; but where the evidence as to the purchase was simply for the purpose of disclosing the character of the place, it will not render it improper to act thereon: *Ibid.*

Connection with the offense: Under particular facts, *held*, that the defendant was not interested as principal in the business of which complaint was made, but that his only connection therewith was that of a wholesale seller to the person who kept the place where the liquors were sold, and that a decree against defendant was improper: *State v. Hart*, 50 N. W. R., 981.

Owner of premises: The allegation of knowledge of the purpose for which the premises were being used not being denied by the owner of the premises, no evidence of that fact is necessary in order to sustain the decree against him: *Overton v. Schindele*, 50 N. W. R., 977.

Where it appeared that the owner of premises had knowledge of and permitted the violation of an injunction by an occupant of the building, *held*, that he was properly punishable for contempt: *De France v. Traverse*, 52 N. W. R., 247.

In a particular case, *held*, that there was nothing to require the court to assume the existence of a homestead right in the premises, and they were properly subjected to a lien for the fine: *Ibid.*

Where it appeared that the owner knew of the unlawful use to which his premises were being put, or was wilfully ignorant thereof, *held*, that an injunction might properly be granted against him: *State v. Grim*, 52 N. W. R., 351.

In a particular case, *held*, that the evidence showed that the building complained of as a nuisance was built upon the defendant's lot, without his knowledge or consent, and had not been occupied under a lease, and that defendant had no knowledge that it was being used for illegal sales of liquors: *State v. Lawler*, 52 N. W. R., 490.

In a particular case, *held*, that there had not been such knowledge and consent on the part of the owner of the premises as to render him liable: *Morgan v. Koestner*, 49 N. W. R., 80.

In such case the premises where the liquors are kept and sold should be declared a nuisance, and the nuisance abated regardless of the liability of the owner: *Ibid.*

Injunction: In an action to restrain a liquor nuisance, *held*, that a Methodist clergyman who resides in a county of the state for the purpose of preaching there for one year, but subject to removal at any time, is a citizen of the county within the meaning of this statute: *Fuller v. McDonnell*, 75–220.

The state has jurisdiction of actions commenced under this section to enjoin a liquor nuisance, although the property is held by an assignee in bankruptcy appointed by the federal court in a foreign state: *Radford v. Thornell*, 81–709.

A writ which enjoined defendant from ununlawfully selling intoxicating liquors on "part of lot number two, in the northeast quarter of the northwest quarter of section twenty-three," *held* not void for uncertainty, as the writ prohibited the doing of certain acts, and would be violated by doing them upon any part of the lot: *Ver Straeten v. Lewis*, 77–130.

Where plaintiff sought to enjoin defendant from keeping a saloon for the sale of intoxicating liquors, and defendant admitted facts sufficient to entitle plaintiff to a decree, but pleaded in abatement the pendency of a former action, *held* that, as defendant failed to sustain his plea in abatement, an injunction should be granted: *Farley v. Hollenfeltz*, 79–126.

In an action to enjoin a liquor nuisance, where the findings of the court are fully sustained by the evidence and warrant the granting of a permanent injunction, it is error not to grant the injunction: *Farley v. O'Malley*, 77–531.

Where an appeal is taken from a final order granting a perpetual injunction, it will not be reversed because the court granted a temporary injunction without notice: *State v. Douglass*, 75–432.

In an action to enjoin the use of leased premises as a liquor nuisance, when it appeared that the lessors knew that the building was fitted up with a bar and other appliances for the sale of drinks, *held*, that such evidence was sufficient to authorize an injunction against them, in the absence of any showing that they acted in good faith in leasing the property: *Ibid.*

The fact that an act in violation of an injunction is done in good faith, in consequence of the advice of counsel, is no defense in a proceeding to punish for contempt. The statute gives to the court no discretion where the violation of an injunction is shown, except as to the amount of fine or term of imprisonment: *Lindsay v. Hatch*, 52 N. W. R., 226.

In an action to restrain and abate a liquor nuisance, where a nuisance is found, it is error for the court to refuse to provide for the abatement of the nuisance in the decree: *McClure v. Braniff*, 75–38.

Where leased premises were used for the unlawful sale of intoxicating liquors, but without the knowledge of the lessors, who were non-residents, and who, upon learning of such unlawful use, in good faith caused the premises to be vacated a few days after the action to enjoin the nuisance was commenced, and they were thereafter used only for lawful purposes, *held*, that it was error to perpetually enjoin the lessors from maintaining a nuisance on said premises and render a judgment against them for costs: *Eckert v. David*, 75–302.

Where an action was commenced to enjoin a liquor nuisance, but was not tried for more than a year and a half afterwards, and defendant continued to maintain the nuisance until three or four days before the trial, *held*, that a reformation of so brief a duration was not sufficient to justify a refusal to grant an injunction restraining the nuisance and abating it: *Halfman v. Spreen*, 75–309.

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In a particular case, *held*, that an agreement to dismiss the prosecution was not sufficiently established to make a subsequent decree erroneous: *Geyer v. Douglass*, 52 N. W. R., 111.

A *supersedeas* bond given on appeal to the supreme court from a decree granting an injunction does not suspend the injunction nor prevent a violation thereof from being punishable: *Lindsay v. Clayton District Court*, 75–509.

So long as a former decree enjoining defendant from keeping and maintaining a nuisance by unlawfully selling liquors on certain premises is in force, a second suit for abatement of the same nuisance, brought by another citizen, should not be allowed in the absence of any showing that the former decree was obtained by collusion with the intent of defeating the purposes of the law: *Dickinson v. Eichorn*, 78–710.

Upon the death of a party in whose name a suit to abate a liquor nuisance has been maintained, his administrator or heirs are not entitled to substitution in his place, but, on the application of a person duly authorized, the name of the state may be substituted. And *held*, that the same principle was applicable where suit was brought to set aside the decree rendered in such action: *Geyer v. Douglass*, 52 N. W. R., 111.

In an action to abate a liquor nuisance, a non-resident of the state who is assignee in bankruptcy, and as such holds title to the lot in question, may be served with notice by publication: *Radford v. Thornell*, 81–709.

2385. Attorney's fees.

Attorney's fees are taxable against the defendant in all cases for the enjoining or abatement of a liquor nuisance, whether such action is prosecuted in the name of the state or of a private citizen of the county: *State v. Douglass*, 75–432; *State v. Boyd*, 52 N. W. R., 513.

The provisions of this section as to general reputation and attorney's fees, *held* applicable to actions which were pending at the time of the passage of the act: *Farley v. O'Malley*, 77–531.

And, as an attorney is entitled to reasonable fees for services rendered in the case, not less than $25 in any court, where an action was commenced in the district court, removed to the federal court, appealed to the supreme court of the United States and remanded to the district court where it was instituted, *held*, that an attorney's fee of $350 was not unreasonable: *Ibid.*

An attorney's fee may be taxed in a case commenced prior to the enactment of this section which is tried after the section took effect: *Farley v. Geisheker*, 78–453.

In a particular case where it appeared that action was brought and a trial was had, involving, however, only the introduction in evidence of the answer filed by defendant, *held*, that an attorney fee of $25 was sufficient: *Ibid.*

The allowance is to the plaintiff and not to his attorney, and an attorney acts for the plaintiff and not in his own right in receiving the fee allowed: *Root v. Heil*, 78–436.

Acceptance by the attorney for the plaintiff of the amount taxed in favor of plaintiff as attorney fees, *held* to constitute a waiver of plaintiff's right to appeal: *Ibid.*

Where there is no controversy as to the amount of attorney's fees, the judge may, upon the record and his own knowledge of the services in the case, fix the amount without testimony; but where there is a contention as to the amount to be taxed, testimony should be heard and the amount determined on the record and testimony alone: *Craig v. Werthmueller*, 78–598.

Under this section, attorney's fees are taxable, whether the suits are prosecuted in the name of the state, or in the name of a citizen of the county: *Newman v. Des Moines County*, 52 N. W. R., 105.

Such fees are a part of the costs, and if not recoverable from defendant are to be paid by the county, as other costs in criminal cases: *Ibid.*

See, also, § 2399 and notes.

2386. Temporary injunction.

Where the petition and affidavit make proper showing for preliminary injunction, and there is no order of the court in regard to the evidence on which such injunction will be issued, the injunction should be granted: *Tibbetts v. Burster*, 76–176.

Contempt: The provision for punishment for contempt without a jury trial is not in violation of the federal constitution: *Eilenbecker v. Plymouth County*, 134 U. S., 31.

A party may be punished for contempt in the violating of an injunction resting upon property with reference to its use for the sale of intoxicating liquors, although he was not a party to the injunction proceedings, and had no knowledge thereof. The decree granting the injunction is a restriction upon the use of the property which follows it as a burden into whosesoever hands it may come: *Silvers v. Traverse*, 82–52.

An order punishing, or refusing to punish, under this section is reviewable upon *certiorari*, and not on appeal: *Currier v. Mueller*, 79–816.

Where the district court refused to punish for a violation of an injunction restraining a liquor nuisance on the ground that an appeal and filing of a *supersedeas* bond prevented a punishment for contempt, *held*, that the proceeding could be reviewed by *certiorari*: *Lindsay v. Clayton District Court*, 75–509.

The only means of reviewing an order of court punishing a person for contempt for violating an injunction issued under this section is by *certiorari*, and the district court does not have authority to admit the defendant to bail pending such proceeding. Such authority is possessed only by the court which can issue a writ of *certiorari*: *State v. District Court*, 50 N. W. R., 677.

The filing of an answer denying that the defendant is at the time of answering maintaining a nuisance as alleged, but not denying the maintenance of such nuisance at the time of the filing of the petition, is not sufficient to defeat the action: *Ibid.*

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2387. Violation of injunction.

The proceeding to punish a contempt of the process of a court is criminal in its nature and by it a disobedience to civil authority is punished. It is merely incidental to the original proceeding and need not be entitled as of the original cause. It is properly brought in the name of the state as plaintiff, and a party making the original affidavit as the basis of the proceeding is competent to do so although not a citizen: *Fisher v. Cass County District Court*, 75-232.

It is erroneous for the court on rendering judgment of a fine for violating an injunction to include in such judgment a provision for the suspension of execution at the pleasure of the court: *State v. Voss*, 80-467.

See, also, notes to § 2384.

2389. Abatement.

A judgment, upon a conviction for maintaining a liquor nuisance, ordering the destruction of the liquor found on the premises and ordering its removal and the sale of all furniture and fixtures and all movable property used in or about the premises in carrying on the unlawful business, and ordering the closing of the building as against its use for saloon purposes for one year unless sooner released, is fully authorized by this section: *State v. Adams*, 81-595.

And the power of the court to order the abatement of a nuisance is not peculiar to the illegal sale of intoxicating liquors: *Ibid.*

And where a judgment provided that the proceeds of the personal property should be used to pay the fine and costs adjudged against defendant, and that the balance, if any, should be paid to him, *held*, that the provision was authorized by this section: *Ibid.*

Such an action is against the thing as well as the person, and as the person has had notice and his day in court upon which to defend the forfeiture of his property as well as the punishment of himself, the provision for forfeiture is not unconstitutional: *Craig v. Werthmueller*, 78-598.

A writ for the seizure and destruction of whatever property may be found on the premises on which the illegal business is carried on is sufficiently definite: *Ibid.*

Where a brewery was used without permit for the manufacture of beer, *held*, that it could be closed under the provisions of this section. The words, "saloon purposes," as here used, are intended to cover every place established to be a nuisance within the provisions of the law relating to the manufacture, sale, or keeping for sale, of intoxicating liquors: *Ibid.*

The decree should order the abatement of the nuisance even though it should appear that the owner of the premises is not responsible therefor: *Morgan v. Koestner*, 49 N. W. R., 80.

See, also, notes to § 2384.

2391. Abatement by owner.

A decree of abatement should be rendered against the premises even though the owner is not responsible for the nuisance. He may, under the provisions of this section, release the property from the effect of such decree: *Morgan v. Koestner*, 49 N. W. R., 80.

2392. Presumptions.

An instruction that the fact that liquors are kept by a person not legally authorized to make sales and not in a private dwelling-house is presumptive evidence of keeping for illegal sale, *held* proper, although defendant was a registered pharmacist and entitled at the time, by law, to keep liquors for use in his business, that fact being properly explained in another portion of the charge: *State v. Shank*, 79-47.

Held, also, that it was proper for the jury to consider the quantity of liquor kept by defendant in connection with the legitimate demands of his business in determining whether or not such liquors were kept for unlawful purposes: *Ibid.*

Instruction in a particular case with reference to the presumption from the finding of liquors, *held* correct: *State v. Illsley*, 81-49.

2396. Fees, payment of.

Failure to pay or secure in advance the fees of the clerk for a transcript on appeal in such case will not defeat the appeal: *Searles v. Lux*, 52 N. W. R., 327.

The costs here provided for are to be paid by the county under the terms of § 5064, and such costs include the attorney's fees, which may be taxed under the provisions of § 2385: *Newman v. Des Moines County*, 52 N. W. R., 105.

2398. Contempt.

A review of the sentence for contempt can only be had by *certiorari*, and the district court cannot admit the defendant to bail pending such proceedings: *State v. District Court*, 50 N. W. R., 677.

And see notes to § 2384.

2399. Attorney's fees.

The attorney in the case in which attorney's fees are taxed is the real party in interest with reference to such fees: *Farr v. Seaward*, 82-221.

Where the county attorney prosecutes such action he is entitled to the attorney's fees taxed, in addition to his other compensation as county attorney: *Ibid.*

And see notes to § 2385.

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2400. License as evidence.

Where defendants claimed to have paid a United States revenue tax for the purpose of protecting themselves in the sale of liquor not intoxicating, but it appeared that they had paid such special license while engaged in selling intoxicating liquors, and had paid it again for the time when they claimed to have ceased to sell the intoxicating liquors and to be engaged only in the sale of liquors not intoxicating, *held*, that payment of the tax was sufficient evidence of keeping intoxicating liquors with intent to sell in violation of law: *State v. Schultz*, 79–478.

2401. Search-warrant; seizure.

If a pharmacist who holds a permit sells liquor for any other purpose than medicine which is actually necessary as such, he is liable to the utmost rigors of the law in force at the time the sales were made, and search may be made for and the liquor seized: *State v. Ward*, 75–637.

Even though liquors be not subject to seizure, yet an action of replevin cannot be maintained to recover possession thereof from an officer holding them under a search-warrant in a proper proceeding: *Lemp v. Fullerton*, 48 N. W. R., 1034.

2403. Search-warrant; costs.

Even though a search is fruitless, the officer making the search is entitled to his fee therefor, which is to be paid by the county as in other criminal prosecutions when the prosecution fails: *Byram v. Polk County*, 76–75.

2405. Intoxication punished.

A person found in a state of intoxication may be lawfully arrested under this section, although he may be also liable to arrest under the ordinances of a city for being intoxicated in a public place: *State v. Garrett*, 80–589.

2406. Illegal sales; proof.

In a prosecution for the illegal sale of liquors, against a party holding a permit, the fact of sales being made not being questioned, *held*, that the burden of proof was upon defendant to show that the sales were for authorized purposes, and as no such evidence was offered, it would be presumed that the sales were unlawful: *State v. Kriechbaum*, 81–633.

2407. Recovery of money paid for.

An agent who sells intoxicating liquors in violation of law, but who does not receive the money or purchase price, is not liable for the amount of the purchase price, at the suit of the purchaser: *Schober v. Rosenfield*, 75-455.

An action cannot be maintained for the recovery of money paid for intoxicating liquors sold in violation of law, without first making demand for the money thus paid: *Ibid.*

In an action to foreclose a mortgage where the defense was that the notes were given for intoxicating liquors sold in violation of law, *held*, that the burden of proof was on defendant to show the alleged illegality, and having failed to do so, it was unnecessary to decide whether this section is applicable to a case of this kind or not: *Ressegien v. Van Wagenen*, 77–351.

Where orders for intoxicating liquors are taken by an agent in one county, subject to approval by the principal in another county, the sale in either county being illegal, the offense is partly committed in each county (under § 5543), and the courts of either have jurisdiction of the offense: *State v. Kriechbaum*, 81–633.

This section refers to sales in violation of the liquor law, and not to illegal sales by pharmacists. The provision is not for the benefit of the vendee: *Kohn v. Melcher*, 43 Fed. R., 641.

2408. Selection of attorney by peace officer.

In any of the cases specified under this section where a peace officer files information before a magistrate, he may select an attorney other than the county attorney to appear for the state; § 5109, although not mentioning other cases than those of the sale of intoxicating liquors, is construed to cover all the cases in which information may be filed under this section: *Nichols v. Polk County*, 78–137.

2410. Transportation.

The words "any other person," used in this section, are intended to include other like persons with those already enumerated: *State v. Campbell*, 76–122.

A person employed by a wholesale dealer, not as a mere servant, but as the owner of means of transportation, to deliver liquors sold to purchasers, is a carrier within the meaning of this section: *Ibid.*

The right to bring liquor into the state in pursuance of interstate commerce involves also the right to sell the same in original packages: *Leisy v. Hardin*, 135 U. S., 100. But this decision does not render the whole statute void; therefore, since the enactment of the "Wilson Bill," liquor brought into the state comes under the operation of the state statute: *In re Spickler*, 43 Fed. R., 653.

Liquors which are in the hands of the carrier for transportation into the state cease to be exempt from seizure, as a part of interstate commerce, when they are placed by the carrier in its warehouse for delivery to consignee: *State v. Creeden*, 78–556.

Further as to how far the bringing into the state and sale of liquors are protected by the constitutional provision as to interstate commerce, see notes to § 2359.

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2416. Term construed.

Alcohol is an intoxicating liquor, and however it may be diluted it is within the terms of the statute, when used as a beverage. Proof that liquor in question contains alcohol is sufficient to show that it is an intoxicating liquor: *State v. Intoxicating Liquors*, 76–243.

2418. Civil damages.

Under this section exemplary damages are to be given as a matter of right in case actual damage is found: *Thill v. Pohlman*, 76–638.

In an action for damages for selling plaintiff's husband intoxicating liquor, *held*, that if defendant furnished the intoxicating liquor to plaintiff's husband under the direction of a third party, or furnished it to others from whom the plaintiff's husband obtained it, this was sufficient to maintain the action: *Judge v. Jordan*, 81–519.

In an action by a wife to recover damages for the sale of intoxicating liquors to her husband, the husband having testified in a former trial, *held* that, although the wife called him as a witness in the former trial, that did not obligate her to call him in this, nor commit her to the statements in his former testimony: *Ibid.*

2419. Property liable.

Where a party takes a deed or mortgage of property, after an action is begun against the owner for the unlawful sale of intoxicating liquors on the premises, the grantee or mortgagee takes the same subject to any judgment which may be rendered against the owner in the action: *McClure v. Braniff*, 75–38.

Where a homestead owned by a husband is used by him for the unlawful sale of intoxicating liquors, it is liable for fines, costs and judgments rendered against him for such illegal sale, and the fact that the unlawful use is without the consent of the wife will not exempt the homestead from such liability, when the husband is owner: *Ibid.*

Judgments for fines rendered in justice courts under this section do not become liens on real estate until a transcript of the judgment is certified and filed in the office of the clerk of the district court: *State v. McCulloch*, 77–450.

The effect of this section is to subject the property to a judgment when the unlawful act or business on which it was based was done and carried on with the knowledge or consent of the owner or his agent. And if the whole business is in violation of law the property will be subject to judgment, without knowledge on the part of the owner of the particular illegal sale causing the damage: *Wing v. Benham*, 76–17.

There is no liability of the landlord in civil damages for the sale of intoxicating liquors on premises owned by him other than the subjection of his property to the payment of the judgment: *McVey v. Manatt*, 80–132.

In a proceeding to subject the property of a landlord to the lien of a judgment for civil damages, if he resists the relief asked costs may be taxed against him personally, although he is not liable to personal judgment for damages: *Ibid.*

In a proceeding to have a judgment for fine and costs decreed a lien, under this section, it is not necessary to show that the indictment and judgment of conviction describe the premises sought to be charged. Parol evidence is admissible to identify the place where the nuisance is actually kept: *State v. Manatt*, 51 N. W. R., 73.

In a particular case, *held*, that the evidence was sufficient to show that a wife who owned the property in which a saloon was openly and notoriously kept was chargeable through her husband, who acted as her agent in the management of the property, with a knowledge of its improper use, so as to render it liable under the provisions of this section: *Johnson v. Grimminger*, 48 N. W. R., 1052.

In a particular case, *held*, that there was not such knowledge on the part of the owner as to render the premises liable for the costs of a proceeding for the abatement of a nuisance: *Morgan v. Koestner*, 49 N. W. R., 80.

CHAPTER 76.

WEATHER AND CROP SERVICE.

[Sections 2445–2448 are repealed by the act following.]

2448a. Repeal. 23 G. A., ch. 29, § 1. Chapter 45 of the laws of the Seventeenth General Assembly is repealed, and the following enacted in lieu thereof.

2448b. Purpose. 23 G. A., ch. 29, § 2. There is established in the state of Iowa, under the supervision of the board of directors of the state agricultural society, a weather and crop service, co-operating with the signal service of United States, for the purpose of collecting crop statistics and meteorological data, and more widely disseminating the weather forecasts and storm

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and frost warnings, for the benefit of producers and shippers of perishable products, and to promote a general knowledge of meteorological science and the climatology of the state.

2448c. Central station; director. 23 G. A., ch. 29, § 3. The central station of said weather and crop service shall be in the city of Des Moines under the charge of a director and an assistant director, the said director to be appointed by the governor for a term of two years upon the recommendation of said board of directors of the state agricultural society; and the assistant director to be an officer of the United States signal service who may be detailed for that purpose by the chief signal officer at Washington, D. C.

2448d. Volunteer stations; bulletins. 23 G. A., ch. 29, § 4. The said director co-operating with the secretary of the state agricultural society shall establish volunteer stations throughout the state, to the number of one or more in each county, and shall appoint observers thereat. And the said director shall supervise said volunteer stations, receive reports therefrom of meteorological events and crop conditions, tabulate the same for permanent record, and shall issue weekly weather crop bulletins during the season from April 1st to October 1st; and he shall also edit and cause to be published at the office of the state printer a Monthly Weather and Crop Review, containing meteorological and agricultural matter of public interest and educational value. And it shall be the duty of the state printer to issue copies of said Review to the number of 1,000 for distribution from the office of the said agricultural society; and the directors of said society may in their discretion cause to be published a larger number of copies to be delivered to subscribers at a price sufficient to defray the expense of publishing the same, the proceeds to be expended for that purpose only.

2448e. Additional copies of Review. 24 G. A., ch. 63, § 2. The director of said service is hereby authorized to issue in addition to the number now provided by law, two thousand copies of the Monthly Review for distribution as provided by said chapter 29, of the laws of the Twenty-third General Assembly [§ 2448*d*]; and it is hereby made the duty of the state printer to print such extra copies, or any portion of the same that the director shall deem necessary in carrying out the intent of said act.

2448f. Annual report. 23 G. A., ch. 29, § 5. The said director shall also compile an annual report, addressed to the governor, to be printed and bound in the office of the state printer in such number as the executive council may direct; said report to contain a complete review and summary of the results of the year's labors and observations.

CHAPTER 8.

MINES AND MINING.

2457. Time allowed for making outlets. 20 G. A., ch. 21, § 9; 22 G. A., ch. 56, § 2; 23 G. A., ch. 46. In all mines there shall be allowed one year to make outlets as provided in section 8 [§ 2456], when such mine is under two hundred feet in depth, and two years when such mine is over two hundred feet in depth; but not more than twenty men shall be employed in such mine at any one time until the provisions of section 8 are complied with; provided that in the case of mines over two hundred feet in depth, there shall be allowed three years on the condition that during the third year not more than ten men shall be employed in such mine at any one time; and provided

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further, that in cases where the two years shall already have expired, a third year shall be allowed after the taking effect of this act; and after the expiration of the period above mentioned should said mines not have the outlets aforesaid, they shall not be operated until made to conform to the provisions of section 8 [§ 2456]. And provided further, that this act shall not apply to mines where the escape way is lost or destroyed by reason of the drawing of pillars preparatory to the abandonment of the mine; provided that not more than twenty persons shall be employed in said mine at any one time. And provided further, that ten men or less may be lawfully employed in any coal mine without reference to the provisions of this or any other act.

[A substitute for the original section.]

CHAPTER 8*a*.

INSPECTION OF COAL OIL.

2484. Appointment of deputies; apparatus. 20 G. A., ch. 185, § 2; 21 G. A., ch. 149, § 1; 24 G. A., ch. 52, § 1. The state inspector provided for in this act, is authorized to appoint such number of deputies as shall be approved by the state board of health, which deputies are empowered to perform the duties of inspection, and shall be liable to the same penalties as the state inspector; *provided*, that the state inspector may remove any of said deputies for reasonable cause. It shall be the duty of the inspector and his deputies to provide themselves at a reasonable expense with the necessary instruments and apparatus for testing the quality of said illuminating oils, and when called upon for that purpose to promptly inspect all oils hereinbefore mentioned, and to reject for illuminating purposes, all oils which will emit a combustible vapor at a temperature of one hundred and five degrees standard Fahrenheit thermometer, closed test, *provided* the quantity of oil used in the flash test shall not be less than one-half pint. The oil tester adopted and recommended by the Iowa state board of health, shall be used by the inspector and his deputies in all tests made by them. And said board shall prepare rules and regulations as to the manner of inspection which rules and regulations shall be in effect and binding upon the inspector and deputies appointed under this act.

[As amended with reference to the number of deputies, and the expense of instruments.]

2486. Inspection. 20 G. A., ch. 185, § 4; 21 G. A., ch. 149, § 2; 24 G. A., ch. 52, § 1. All inspections herein provided for shall be made within the state of Iowa, and the inspector and deputy inspectors shall be entitled to demand and receive from the owner or party calling on him or for whom he shall perform the inspection the sum of ten cents per barrel, and for the purposes of this act a barrel shall be deemed to be fifty-five gallons. All fees accruing for inspection shall be a lien upon the oil so inspected, and shall be paid into the state treasury (except as provided in sections 2 and 3 of this act [§§ 2486*a*, 2486*b*]), by the state oil inspector, by the fifteenth day of each month, for the calendar month preceding.

[As amended by the addition of the provision at the end relating to payment of fees.]

2486a. Salary and allowance. 24 G. A., ch. 52, § 2. The state oil inspector shall, from and after the 1st day of April, 1892, be paid a salary out of the state treasury, of two thousand dollars per annum, which shall be paid to him in monthly instalments at the end of each month; and the auditor of state shall issue his warrant therefor; *provided* the state inspector shall be

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permitted to charge and receive such further sum as he actually and necessarily expends in traveling, for instruments and apparatus, for prosecutions incurred in the discharge of his official duty, and for necessary help in stenciling or marking barrels, casks or packages.

2486b. Fees of deputies. 24 G. A., ch. 52, § 3. Each deputy inspector shall collect all fees and commissions, now or hereafter provided by law for inspecting products of petroleum, earned by him, and each deputy inspector may retain for his services actually rendered, all fees and commissions earned by him until the same amount to fifty dollars per month; also twenty-five per cent. thereafter: *provided*, that no deputy inspector shall be allowed to receive, as salary, fees or commissions exceeding one hundred dollars per month; and *provided further* that each deputy inspector shall be permitted to charge and receive such further sum as he actually and necessarily expends in traveling, for instruments and apparatus, for prosecutions incurred in discharge of his official duty and for necessary help in stenciling or marking barrels, casks or packages, the same to be paid by the state inspector.

2486c. Accounts; report. 24 G. A., ch. 52, § 4. The state inspector and each of his deputies are required to keep an accurate account of his own actual expenses; and each deputy inspector is required to report an itemized bill, verified by oath, of his actual expenses to the state inspector at the beginning of each month for the calendar month preceding; and the state inspector to report an itemized bill, verified by oath, of the actual expenses and receipts of himself and deputies by the fifteenth day of each month, for the preceding calendar month, to the executive council, the same to be audited and approved by said council.

2487. Record and report. 20 G. A., ch. 185, § 5; 22 G. A., ch. 82, § 38; 24 G. A., ch. 52, § 1. It shall be the duty of the state inspector and every deputy inspector to keep a true and accurate record of all oils so inspected and branded by him which record shall state the date of inspection, the number of gallons rejected, the number of gallons approved, the number of gallons inspected, the number and kind of barrels, casks or packages, the name of the person for whom inspected and the amount of money received for such inspection; and such record shall be open to the inspection of all persons interested; and every deputy inspector shall return a true copy of such record, together with all fees collected by him, except as provided in section 3 of this act [§ 2486*b*], at the beginning of each month to the state inspector. It shall be the duty of the state inspector to make and deliver to the governor for the fiscal period ending the thirteenth day of June, 1885, and every two years thereafter, a report of the inspections made by himself and deputies for such period, containing the information and items required in this act to be made of record, and the same shall be laid before the general assembly.

[As amended so as to require deputies to return fees.]

CHAPTER 8*a*.

STATE DAIRY COMMISSIONER.

2514a. Additional clerk hire. 24 G. A., ch. 50, § 6. The state dairy commissioner, if it shall be found necessary, may increase the clerk hire of his office twenty-five dollars per month.

[Other sections of this act are inserted *infra*, §§ 5363–5363*f*.]

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2515. Duties; reports. 21 G. A., ch. 52, § 13; 23 G. A., ch. 52, § 5. It shall be the duty of the state dairy commissioner to secure, so far as possible, the enforcement of this act. He shall collect, arrange and present in annual reports to the governor on or before the first day of November of each year, a detailed statement of all matters relating to the purposes of this act, which he shall deem of public importance including the receipts and disbursements of his office.

[As amended by omitting provision for publication of report with that of state agricultural society.]

CHAPTER 8*d*.

PRACTICE OF PHARMACY.

2526. Registry of certificates; forfeiture; renewal. 18 G. A., ch. 75, § 4; 19 G. A., ch. 137, § 1; 22 G. A., ch. 71, § 22; 22 G. A., ch. 106; 23 G. A., ch. 36. The commissioners of pharmacy shall register in a suitable book, the names and places of residence of all persons to whom they issue certificates, and dates thereof. Druggists and pharmacists, who were registered without examination, shall not forfeit their registration when they have voluntarily sold, parted with, or severed their connection with the drug business for a period of two years at the place designated in certificate of registration. Should such party wish to re-engage in the practice of pharmacy, he will not be required to be registered by examination as per section five [§ 2527], *provided* that registered pharmacists who remove to another locality, and re-engage in the practice of pharmacy within a period of two years, and have paid to the commission of pharmacy the sum of one dollar on or before the twenty-second day of March of each year, as provided in this chapter, such registered pharmacist shall not be required to register by examination, but his former registration shall be in full force and effect. Every registered pharmacist, who desires to continue his profession, shall, on or before the twenty-second day of March of each year, pay to the commission of pharmacy the sum of one dollar, for which he shall receive a renewal of his certificate unless his name has been stricken from the register for violation of law. It shall be the duty of each registered pharmacist, before changing his locality as designated in his certificate of registration, to notify the secretary of the commission of pharmacy of his new place of business, and for recording the same and certification thereto, the secretary shall be entitled to receive fifty cents for each certificate. It shall be the duty of every registered pharmacist to conspicuously post his certificate of registration in his place of business. Any person continuing in business, who shall fail or neglect to procure his annual renewal of registration, or who shall change his place of business without complying with this section, or who shall fail to conspicuously post his certificate of registration in his place of business, shall for each such offense be liable to a fine of ten dollars for each calendar month during which he is so delinquent.

[As amended by changing the provisions with reference to pharmacists registered without examination.]

2530. Right to sell.

Where a father made an arrangement with his son, who was engaged in business as a pharmacist, to pay the debts of the son and take the business, but allowed the son to remain in charge of the business and carry it on in his own name so as to avoid the provisions of the pharmacy law, *held*, that the transfer to the son was in evasion of law, and the father lost the right to reclaim the property: *McIntosh v. Wilson*, 81–339.

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Reports of sales of liquor by registered pharmacists made to the county auditor may be introduced in evidence for the purpose of proving illegal sales: See notes to § 2359*k*.

The provision of this section as to sale of drugs by registered pharmacists has no reference to sales of stocks of goods under foreclosure or judicial sale: *Cocke v. Montgomery*, 75–259.

2531. Sale of liquor.

The provision of a former statute that druggists who abused their trust with regard to sales of liquor should be subject to the utmost rigors of the law relating to the sale of intoxicating liquors, *held* not necessarily to require the highest penalty to be fixed in cases of illegal sales by druggists: *State v. Hoagland*, 77–135.

2532. Itinerant vendor.

To constitute an itinerant vendor it is not necessary that the person should travel constantly, and have no fixed place to sell. He may have a place of business where he sells his goods during a part of the time, and travel for the sale of his medicines at other times, and he may therefore be within the provisions of this section: *Snyder v. Closson*, 50 N. W. R., 678.

This section is not unconstitutional as not being of uniform operation. It does not involve any discrimination in favor of citizens of one city as against those of another, nor against resident merchants: *State v. Goerss*, 51 N. W. R., 1147.

A physician's certificate entitling him to practice medicine does not exempt one who is an itinerant vendor, as provided in this section, from its provisions: *Ibid.*

2534. Prescriptions; proprietary medicines.

This section does not authorize a physician to sell intoxicating liquors to his patients, though such sales are made in good faith, and according to the needs of the patients: *State v. Benadom*, 79–90.

The authority here given to sell proprietary medicines does not authorize persons to itinerate for the purpose of making such sales, and one who does so will be within the provisions of § 2532: *Snyder v. Closson*, 50 N. W. R., 678; *State v. Goerss*, 51 N. W. R., 1147.

CHAPTER 8*a*.

PRACTICE OF DENTISTRY.

2543. Fees; compensation; report. 19 G. A., ch. 36, § 9; 23 G. A., ch. 52, § 4. In order to provide the means for carrying out and maintaining the provisions of this act, the said board of examiners may charge each person applying to or appearing before them for examination for license to practice dentistry a fee of two dollars; and out of the funds coming into the possession of the board from the fees so charged, the members of said board may receive as compensation the sum of five dollars for each day actually engaged in the duties of their office. And no part of the salary or other expenses of the board shall ever be paid out of the state treasury. All moneys received in excess of said per diem allowance shall be held by the secretary of said board as a special fund for meeting the expenses of said board, he giving such bond as the board shall from time to time direct. The said board shall make a biennial report of its proceedings to the governor, by the fifteenth of November of each year, together with an account of all moneys received and disbursed by them pursuant to this act.

[As amended so as to provide for a biennial instead of an annual report.]

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CHAPTER 8f.

PRACTICE OF MEDICINE.

2552. Certificates; revocation.

The board, after granting a certificate, even to a physician who had been in practice five years before the taking effect of the statute, can, in some manner, make inquiry as to the competency of the holder, and, if palpably incompetent, revoke it. As they might revoke the certificate after issuing it to one who had been in practice for five years before the taking effect of the statute, so they might refuse to issue a certificate to such practitioner if he should appear to be incompetent: *State v. Mosher*, 78–321.

2553. Practitioner.

In order that a physician may bring himself within the exceptions of this section relating to five years' practice before the statute took effect, he must comply with the proviso and present to the court the proper certificate of such fact: *State v. Mosher*, 78–321.

2554. Practicing without license.

The prescribed qualification to practice is to be fixed by the board, even where a physician had been in practice for five years before the taking effect of the statute; and a physician who, though he had thus been in practice for five years, has not a certificate, is punishable under this section for practicing without a license: *State v. Mosher*, 78–321.

CHAPTER 8g.

STATE BOARD OF HEALTH.

2573. Regulations; penalty. 18 G. A., ch. 151, § 16; 24 G. A., ch. 59. Local board of health shall make such regulations respecting nuisances, sources of filth, causes of sickness, rabid animals and quarantine, not in conflict with regulations made by the state board of health, and on board any boats in harbors or ports within their jurisdiction, as may be necessary for the public health and safety. Upon written notice given by any practicing physician that small-pox, diphtheria, scarlet fever, or any other contagious or infectious disease dangerous to the public health exists in any place, it shall be the duty of the mayor of any incorporated city or town, and the clerk of any district township forthwith without other authority to establish quarantine in such cases as may be required by regulations of the state board of health and said local boards, and to maintain and remove such quarantine in like manner. If any person shall violate any such regulation as herein provided, he shall be fined not less than twenty-five dollars for each and every day he knowingly disregards or violates the same, to be recovered before any court of competent jurisdiction. Notice shall be given of all regulations made by said local boards, by publishing the same in a newspaper published in their jurisdiction, or where there is no newspaper, by posting in no less than five public places.

[Substitute for the original section.]

The action of the board of health finding a structure to be a nuisance does not entitle a private party claiming to be injured thereby to maintain a proceeding for the abatement thereof. The finding of the board of health is not conclusive of the facts in such private action: *Kallsen v. Wilson*, 80–229.

CHAPTER 9.

BANK STATEMENTS.

2585. Receivers.

After the assets of a bank have passed into the hands of a receiver, a creditor cannot commence an action and obtain a judgment which will be a lien and thus interfere with the ratable distribution of the assets to all the creditors: *Richards v. Osceola Bank*, 79–707.

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TITLE XII.

EDUCATION.

CHAPTER 1*a*.

STATE EDUCATIONAL BOARD OF EXAMINERS.

2600. State certificates and diplomas. 19 G. A., ch. 167, § 8; 23 G. A., ch. 22. Said board shall have power to issue state certificates and state diplomas to such teachers as are found, upon examination, to possess good moral character, thorough scholarship, clear and comprehensive knowledge of didactics, and successful experience in teaching. They shall also have power to issue state certificates and state diplomas to such graduates of any Iowa state normal school as are shown to possess good moral character, the certificate to be issued when the graduate is proved to have had thirty-six weeks' successful experience in teaching, and the diploma when five years such experience is shown.

[As amended by the addition of the last sentence.]

CHAPTER 3.

STATE AGRICULTURAL COLLEGE.

2643. Sale of lands.

Although lands belonging to the Agricultural College are required to be sold on time, in order to provide a fund for the college arising from the interest, the college may receive the principal when its interest will be promoted thereby, and it will be presumed that the officers acted rightly and for the interests of the college when the principal is received: *Burtis v. Humboldt County Bank*, 77–103.

CHAPTER 4*a*.

INSTITUTION FOR FEEBLE-MINDED CHILDREN.

2717. Support; appropriation. 19 G. A., ch. 40, § 9; 23 G. A., ch. 56. For the support of said institution there is hereby appropriated, out of any money in the treasury not otherwise appropriated, the sum of ten dollars per month for each inmate therein supported by the state, counting the actual time such person is an inmate and supported by the institution; and upon presentation to the auditor of state of a sworn statement of the average number of inmates supported in the institution by the state for the preceding month, the auditor of state shall draw his warrant upon the treasurer of the state for such sum. For the ordinary expenses of the institution, including furniture, books, school apparatus, and compensation of officers and teachers

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and other employees, there is hereby appropriated the sum of twenty-two thousand dollars annually, or so much thereof as may be necessary, which may be drawn quarterly upon the order of the trustees.

[As amended by including other employees with officers and teachers, and increasing the appropriation from eleven to twenty-two thousand dollars.]

CHAPTER 5.

STATE INDUSTRIAL SCHOOL.

2749. Appropriation for girls' department. 19 G. A., ch. 92, § 1; 23 G. A., ch. 54. There is hereby appropriated, out of any money in the state treasury not otherwise appropriated, the sum of eleven dollars per month, or so much thereof as may be necessary, for each girl actually supported in the state reform school, counting the average number sustained in the school for the month, and upon the presentation to the auditor of state, each month, of a sworn statement of the superintendent of the average number of girls supported by the school for the preceding month, the auditor of state shall draw his warrant on the treasurer of state in favor of the treasurer of the board of trustees of the state reform school for the sum hereinbefore provided.

[As amended increasing the allowance for support from ten to eleven dollars.]

CHAPTER 6*a*.

INDUSTRIAL HOME FOR THE BLIND.

2768a. Name. 24 G. A., ch. 51, § 1. The home for the blind located at Knoxville, in Marion county, shall be known as "The Industrial Home for the Blind."

2768b. Object. 24 G. A., ch. 51, § 2. The objects of said home are, first, to instruct the adult blind of the state, who may be admitted thereto, in some suitable trade or avocation, in order to enable them to earn their own support or contribute thereto; and, second, to furnish a working home for such of the adult blind of the state as have learned a trade or avocation, and may desire to remain or be employed in the said home.

2768c. Persons eligible. 24 G. A., ch. 51, § 3. Every adult blind person who has a legal settlement in the state of Iowa, and who is physically and mentally able to perform such manual labor as may be required in the trades or avocations carried on at said home, shall be eligible to become an inmate thereof, under such reasonable rules and restrictions as may be adopted by the commissioners or trustees in charge of said home.

2768d. Management and control. 24 G. A., ch. 51, § 4. The said home shall be under the management and control of six trustees, one of whom shall be a woman, and one of whom shall be a resident of Marion county; and not more than three of the male members of said board shall be members of the same political party. A majority of said board shall constitute a quorum for the transaction of business. No member of the general assembly shall be eligible to membership on said board.

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2768e. Trustees. 24 G. A., ch. 51, § 5. Said trustees shall be elected by the Twenty-fourth General Assembly, two for two years, two for four years, and two for six years; their successors to be elected for six years each by succeeding general assemblies, and the terms of office of the trustees elected by the Twenty-fourth General Assembly shall commence on the first Monday of May, 1892.

2768f. Officers. 24 G. A., ch. 51, § 6. The said board of trustees shall have the general supervision and control of said home, and the management of its affairs, and when appointed and qualified by making and subscribing to an oath of office, which shall be filed in the office of the auditor of state, the said trustees shall have power:

First. To organize by electing a president, secretary and treasurer from their own number, and to formulate and adopt by-laws not inconsistent with the laws of Iowa for their own government.

Second. To elect a superintendent and matron for the said home, and to prescribe duties and fix salaries for such superintendent and matron.

Third. To appoint, from their own number, an auditing board of not less than three, a majority of which shall constitute a quorum, but their action in auditing bills shall be subject to review by the full board when in session.

Fourth. To fix the rate of compensation to be paid the employees and inmates of said home for labor performed, and determine the amount which shall be charged the inmates and employees for their board and maintenance.

Fifth. To manage and control the said home and all its property both real and personal, to direct and order the purchase of supplies for said home and the material for use in the manufactures therein carried on, and to provide for the proper marketing of the manufactured products of said home.

Sixth. To make reasonable rules and regulations for the government of said home, and prescribe the terms and conditions for the admission of blind persons thereto and discharge therefrom.

Seventh. To direct the expenditure of all appropriations which may from time to time be made by the general assemblies for the use of said home, as well as the proceeds of the sale of articles manufactured therein.

2768g. Compensation of trustees. 24 G. A., ch. 51, § 7. Said trustees shall receive for their services four dollars per day, and such mileage or expenses as may now or hereafter be allowed by law for trustees of other state institutions.

2768h. Treasurer's bond. 24 G. A., ch. 51, § 8. The treasurer of said board shall give bond in such sum as the board may require, conditioned for the faithful accounting for all moneys that may come into his hands.

2768i. Record; report. 24 G. A., ch. 51, § 9. The said board of trustees shall keep a full and complete record of their proceedings, including all receipts and expenditures, and shall file in the office of the governor, their biennial report not later than the first day of September preceding the regular meeting of each general assembly.

CHAPTER 7.

IOWA SCHOOL FOR THE DEAF.

2769a. Name changed. 24 G. A., ch. 65, § 1. The Iowa institution for the education of the deaf and dumb, located at Council Bluffs, Iowa, shall hereafter be known as "The Iowa School for the Deaf" and the trustees of said institution shall be known as the board of trustees of the Iowa School for the Deaf.

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2769b. 24 G. A., ch. 65, § 2. All acts and parts of acts in conflict with the provisions of this act are hereby repealed.

2779. Clothing for pupils. 1695; 23 G. A., ch. 55, § 1. When the pupils of said institution are not otherwise supplied with clothing or transportation, they shall be furnished by the superintendent, who shall make out an account of the cost thereof in each case, against the parent or guardian if the pupil is a minor, and against the pupil if he or she have no parent or guardian or have attained the age of majority; which account shall be certified to be correct by said superintendent; and when so certified, such an account shall be presumed correct in all courts. The superintendent shall thereupon remit said accounts by mail to the treasurer of the county from which the pupil so supplied shall have come to said institution; such treasurer shall proceed at once to collect the same by suit in the name of his county if necessary, and pay the same into the state treasury; the superintendent shall, at the same time, remit a duplicate of such account to the auditor of state, who shall credit the same to the account of the institution, and charge it to the proper county; *provided*, if it shall appear by the affidavit of three disinterested citizens of the county, not of kin to the pupil, that the said pupil or his or her parents would be unreasonably oppressed by such suit, then such treasurer shall not commence the said suit, but shall credit the same to the state on his books, and report the amount of such account to the board of supervisors of his county, and the said board shall levy sufficient tax to pay same to the state, and to cause the same to be paid into the state treasury. [10 G. A., ch. 54, § 7; 12 G. A., ch. 106, § 6.]

[As amended so as to cover transportation.]

2780. Money drawn. 1696; 23 G. A., ch. 55, § 2. The above-mentioned appropriations, including the accounts for clothing or transportation aforesaid, shall be drawn quarterly on the requisition of the board of trustees of the institution, in the usual manner, and then only in such amounts as the wants of the institution may require. [10 G. A., ch. 54, § 8; 12 G. A., ch. 106, § 7.]

[As amended so as to cover transportation.]

CHAPTER 7*a*.

SOLDIERS' HOME.

2800. Appropriation. 22 G. A., ch. 121, § 1; 23 G. A., ch. 58. There is hereby appropriated out of any money in the treasury the sum of ten hundred and fifty dollars per month for the salary and wages of the officers and employees of said home.

[As amended increasing the annual appropriation.]

2802a. Residence after discharge. 24 G. A., ch. 24, § 1. Any ex-soldier, sailor, or marine, who may be discharged from the Iowa Soldiers' Home, his residence shall be the same as when admitted to said home.

2802b. In case of insanity. 24 G. A., ch. 24, § 2. In case any ex-soldier, sailor or marine, inmate of the Iowa Soldiers' Home, should be adjudged insane, by the proper commissioners, he shall be taken charge of by the proper officer, under the direction of said commissioners, and all costs and expenses, shall be paid by the county where his residence was when admitted to said home.

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CHAPTER 9.

SYSTEM OF COMMON SCHOOLS.

2819. Districts.

The adoption of this section did not have the effect to divide all subdistricts already formed from territory belonging to two or more townships. Where a portion of territory of one township had been attached to another for school purposes, this section did not work its restoration, but it remained in its former connections until restored by the provisions of § 2917: *Hancock v. District T'p*, 78–550.

2823. Powers.

Where a board of school directors exceeded the authority conferred upon them by the electors, by entering into a contract different from the one authorized, which subsequently was the occasion of a controversy between the district and the other parties to the contract, *held*, that the action of the board of directors might be ratified by the district, and the action of the electors authorizing the settlement of the controversy was a ratification: *Everts v. District T'p*, 77–87.

While the power to fix and relocate school-house sites is vested in the board, the district meeting may make disposition of an old school-house other than by its removal to a new site: *Peters v. Warner*, 81–335.

Where a tax was voted for the erection of a new school-house at the center of the district, the old school-house, situated some distance from the center, being not entirely unfit for use but unsuitable for removal, *held*, that the tax was not illegal: *Seaman v. Baughman*, 82–216.

Held, also, that it was no objection to the tax that the new site had not been secured when it was voted: *Ibid.*

The provision of this section as to levying taxes does not require that the vote thereof be by ballot: *Ibid.*

The correctness of the record of a meeting of the electors of a school district cannot be questioned in a collateral action: *Everts v. District T'p*, 77–87.

The provisions of this section as to securing, at the expense of the district, highways for proper access to the school-house, are by the provisions of § 2927 applicable to independent districts: *McShane v. Independent Dist.*, 76–333.

2825a. Election of subdirectors. 24 G. A., ch. 20, § 1. At the regular meeting of the board of directors of district townships in September, 1892, the board of directors shall specify what subdistricts, at the subdistrict election following in March, shall elect subdirectors for one year, two years and three years, respectively, making the three classes as nearly equal as possible.

2825b. Terms. 24 G. A., ch. 20, § 2. After this election in March, all subdirectors shall be elected and hold office for a term of three years.

2825c. 24 G. A., ch. 20, § 3. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

2828. Women eligible to office of superintendent.

As to eligibility of women, see *Brown v. McCollum*, 76–479.

2830. Treasurer.

A treasurer may be elected at an adjourned meeting: *Carter v. McFarland*, 75–196.

2832. Making contracts.

A board of directors cannot make a contract of employment with one of its number for services to be rendered in connection with the erection of school buildings; for instance, as a local superintendent of construction. The duties of director and those of a person thus employed would necessarily be inconsistent: *Weitz v. Independent Dist.*, 78–37.

The award of a contract to a bidder whose bid does not comply with the requirements of statute is not binding: *Weitz v. Independent Dist.*, 79–423.

A contract for the purchase of charts purporting to bind the directors and not the district, *held* not capable of ratification: *Western Pub. House v. District T'p*, 50 N. W. R., 551.

Subdirectors in the exercise of the powers conferred upon them are to act in subordination to the board or its president. A subdirector has no authority to refuse to allow apparatus to be used in the schools of his subdistrict on the ground that the board had not power to purchase it or that it is worthless: *District T'p v. Meyers*, 49 N. W. R., 1042.

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2833. School-house sites.

In a particular case, *held*, that the disposition of the old school-house, other than its removal to a new site, was within the power conferred by the statute upon the district meeting, and that the power conferred upon the board, with reference to the location of the school-house, involved the exercise of discretion on the part of the board, and that they might take into consideration the condition of the district funds, the difficulty and expense of relocating the school-house and the convenience and best interests of all persons concerned: *Peters v. Warner*, 81–335.

2844. Contingent fund; contracts.

The contingent fund is designed for rent, fuel, repairs and all other expenses necessary for keeping the school in operation. The board cannot use money on hand for the purchase of maps and charts and go in debt for other necessary expenses. The law appropriates the contingent fund on hand or available to the necessary expenses of keeping the school in operation, so far as it is necessary for that purpose: *Yaggy v. District T'p*, 80–121.

A purchase of maps and charts must be from a contingent fund in the treasury; that is, it must be a cash fund, with money on hand unappropriated for other purposes; therefore, where a warrant payable in the future was issued for such purpose, and the money on hand was necessary for other purposes which must be provided for out of the contingent fund, *held*, that such warrant was not valid: *Ibid.*

Where an order is drawn payable in the future for maps and charts, the burden is on the party claiming under it to show that it had support in the condition of the contingent fund when issued: *Ibid.*

The salaries of secretary and treasurer are part of the necessary expenses of keeping the school in operation, to which purpose the contingent fund should be applied before the purchase of maps and charts: *Ibid.*

The obligation to teach physiology and hygiene with special reference to the effects of narcotics (§ 2884) is not paramount to the provisions of this section with reference to the use of the contingent fund: *Ibid.*

The district board has the authority to determine what apparatus shall be used in the schools of the district, and the subdirector cannot prevent the use of such apparatus in the schools in his district on the ground that the contract for the purchase thereof is unauthorized, or that it is worthless: *District T'p v. Meyers*, 49 N. W. R., 1042.

2846. Liability of treasurer.

The treasurer is liable for all money coming into his hands, even though stolen without fault, or accidentally lost or destroyed: *Independent Dist. v. King*, 80–497.

Where a school district treasurer deposited money in his own name but not with his own funds, and the bank knew the nature of the deposit, *held*, that such deposit constituted a trust fund, and that to the extent of any money on hand at the time of the failure of the bank, the district township was entitled to reimbursement in preference to other depositors and creditors; *Ibid.*; *Bunton v. King*, 80–506.

2849. Discharge of teachers.

The provisions of this section do not apply where the board seeks to exclude the teacher from carrying out a contract which it is claimed has never been lawfully made: *Hull v. Independent Dist.*, 82–686.

2852. Rules for subdirector.

The subdirector in the discharge of his duties with reference to the schools in his subdistrict is subordinate to the authority of the board of directors: *District T'p v. Meyers*, 49 N. W. R., 1042.

2853a. Powers of board as to text-books. 23 G. A., ch. 24, § 1. The board of directors of each and every district township and independent district in the state of Iowa is hereby authorized and empowered to adopt text-books for the teaching of all branches that are now or may hereafter be authorized to be taught in the public schools of the state, and to contract for and buy said books and any and all other necessary school supplies at said contract prices and to sell the same to the pupils of their respective districts at cost, and said money so received shall be returned to the contingent fund. The books and supplies which are purchased under the provisions of this section shall be under the charge of the president of each board of directors; he shall care therefor and receive all moneys for books sold, and he shall be responsible for all such books and moneys, and he shall give a bond in the sum of five hundred dollars with sureties to be approved by the county board of supervisors, to insure the faithful performance of such duties.

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2853b. Contingent fund. 23 G. A., ch. 24, § 2. All the books and other supplies, purchased under the provisions of this act, shall be paid for out of the contingent fund, and the board of directors shall annually certify to the board of supervisors the additional amount necessary to levy for the contingent fund of said district to pay for such books and supplies; but such additional amount shall not exceed, in any one year, the sum of one dollar for each pupil residing in the district township or independent school district, and the amount so levied shall be paid out on warrants drawn for the payment of books and supplies only; but the district shall contract no debt for that purpose.

2853c. Purchase and exchange. 23 G. A., ch. 24, § 3. In the purchasing of text-books, it shall be the duty of the board of directors or the county board of education to take into consideration the books then in use in the respective districts, and they may buy such additional number of said books as may, from time to time, become necessary to supply their schools, and they may arrange on equitable terms for exchange of books in use for new books adopted.

2853d. Failure of publishers to furnish. 23 G. A., ch. 24, § 4. If at any time the publishers of such books as shall have been adopted by any board of directors or county board of education, shall neglect or refuse to furnish such books when ordered by said board in accordance with the provisions of this act, at the very lowest price, either contract or wholesale, that such books are furnished any other district or state board, or were furnished to any other district or state board in the year 1889, then said board of directors or county board of education may, and it is hereby made their duty to bring suit upon the bond given them by the contracting publisher.

2853e. Bids; selection. 23 G. A., ch. 24, § 5. Before purchasing text-books under the provisions of this act, it shall be the duty of the board of directors, or county board of education, to advertise, by publishing a notice for three consecutive weeks in one or more newspapers published in the county; said notice shall state the time up to which all bids will be received, the classes and grades for which text-books and other necessary supplies are to be bought, and the approximate quantity needed; and said board shall award the contract for said text-books and supplies to any responsible bidder or bidders offering suitable text-books and supplies at the lowest prices, taking into consideration the quality of material used, illustrations, binding and all other things that go to make up a desirable text-book; and may to the end that they may be fully advised, consult the county superintendent, or, in case of city independent districts, with city superintendent or other competent persons, with reference to the selection of text-books; provided, that the board may reject any and all bids, or any part thereof, and re-advertise therefor as above provided.

2853f. Displacing books selected. 23 G. A., ch. 24, § 6. It shall be unlawful for any board of directors or county board of education, except as provided in section 4 [§ 2853*d*] to displace or change any text-book that has been regularly adopted and introduced under the provisions of this act, before the expiration of five years from the date of such adoption, unless authorized to do so by a majority of the electors present and voting at their regular annual meeting in March, due notice of said proposition to change or displace said text-books having been included in the notice for the said regular meeting.

2853g. Samples; bond. 23 G. A., ch. 24, § 7. Any person or firm desiring to furnish books or supplies under this act, in any county, shall, at or before the time of filing his bid hereunder, deposit in the office of the county auditor samples of all text-books included in his bid, accompanied with lists giving the lowest wholesale and contract price for the same. And said samples and

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lists shall remain in the county auditor's office, and shall be delivered by him to his successor in office; and shall be kept by him in such safe and convenient manner as to be open at all times to the inspection of such school officers, school patrons and school teachers as may desire to examine the same and compare them with others, for the purpose of use in the public schools. The board of directors and county board of education mentioned, shall require of any person or persons with whom they contract for furnishing any books or supplies to enter into a good and sufficient bond in such sum and with such conditions and sureties as may be required by such board of directors or county board of education for the faithful performance of any such contract.

2853h. Proceedings to secure county uniformity. 23 G. A., ch. 24, § 8. When a petition shall have been signed by one-half the school directors in any county, and the same shall have been filed in the office of the county superintendent of said county, at least thirty days before the annual school elections in March, asking for a uniform series of text-books in the county, then the said county superintendent shall notify the county auditor and the board of supervisors of such petition. Such notice shall be in writing and shall be served or delivered as soon as possible, and within fifteen days after the filing of the petitions provided for herein the board of education provided for in section 9 [§ 2853*i*], shall meet and provide for the submission of the question of county uniformity.

2853i. County board of education. 23 G. A., ch. 24, § 9. The county superintendent, the county auditor and the county board of supervisors shall constitute a board of education, whose duty it shall be to arrange for a vote by the electors at the annual meeting in March, for or against county uniformity of school text-books under such rules and regulations as said board of education may determine. Should a majority of the electors, voting at such election, favor a uniform series of text-books for use in said county, then the county board of education shall meet and select the school text-books for the entire county, and contract for the same under such rules and regulations as the said board of education may adopt. When a list has been so selected, they shall be used by all the public schools of said districts, and the board of education may arrange for such depositories as they may deem best, and may pay for said school books out of the county funds and sell them to the school districts at the same price as provided for in section one of this act [§ 2853*a*], and the money received from said sales shall be returned to the county funds by said board of education monthly. The boards of school officers who are made the judges of the school meetings, shall certify to the board of supervisors the full returns of the votes cast at said meetings the next day after the holding of said meetings, who shall, at their next regular meeting, proceed to canvass said votes and declare the result.

2853j. Officers; report. 23 G. A., ch. 24, § 10. The county superintendent shall, in all cases, be chairman of the county board of education, and the county auditor shall be the secretary, and a full and complete record shall be kept of their proceedings in a book kept for that purpose in the office of the county superintendent. A list of text-books so selected, with their contract prices, shall be reported to the state superintendent with the regular annual report of the county superintendent.

2853k. Officers or teachers not to act as agents. 23 G. A., ch. 24, § 11. It shall be unlawful for any school director, teacher or member of the county board of education to act as agent for any school text-books or school supplies during such term of office or employment, and any school director, officer, teacher or member of the county board of education who shall act as agent or dealer in school text-books or school supplies, during the term of such office or employment, shall be deemed guilty of a misdemeanor, and shall

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upon conviction thereof, be fined not less than ten dollars nor more than one hundred dollars, and pay the costs of prosecution.

2853l. City schools. 23 G. A., ch. 24, § 12. The provisions of sections eight, nine and ten of this act [§§ 2853*h*–2853*j*] shall not apply to schools located within cities or towns, nor shall the electors of said cities or towns vote upon the question of county uniformity, but nothing herein shall be so construed as to prevent such schools in said cities and towns from adopting and buying the books adopted by the county board of education at the prices fixed by them, if by a vote of the electors they shall so decide.

2853m. 23 G. A., ch. 24, § 13. All acts or parts of acts in conflict with the provisions of this act are hereby repealed.

2855. Authority of president of board of directors.

This section does not authorize the president of the board of directors to bring suits on his own motion: *Independent Dist. v. Wirtner*, 52 N. W. R., 243.

2863. Contingent fund.

The contingent fund is designed for rent, fuel, repairs and all other expenses necessary for keeping the school in operation, and is to be deemed as appropriated by law to such necessary expenses so far as required for that purpose: *Yaggy v. District T'p*, 80–121.

As to the use of contingent funds for the purchase of maps, charts, apparatus, etc., see § 2844 and notes.

2867. Oath; vacancy. 1752; 24 G. A., ch. 19. Each subdirector shall, on or before the third Monday in March following his election, appear before some officer qualified to administer oaths, and take an oath to support the constitution of the United States and that of the state of Iowa, and that he will faithfully discharge the duties of his office; and in case of failure to qualify, or the district fails to elect, the board shall fill the office by appointment.

[As amended by adding the provision in regard to appointment in case of vacancy.]

2872. Contracts with teacher.

In a particular case, *held*, that authority having been given the president to employ teachers with the consent of the board, it appeared that the consent involved was the individual consent of the members, and that the teacher having entered upon the discharge of her duties, under a contract with the president, and with the knowledge of the members of the board, implied from their want of objection, the contract was binding: *Hull v. Independent Dist.*, 82-686.

Also *held*, that although the rule of the board that only teachers having first class certificates should be employed was known to the teacher making such contract, yet that as the possession of such a certificate was relevant only to the question of competency, the contract was not thereby rendered void: *Ibid.*

2898. Taxes.

Where territory has been attached to a district township for school purposes, the district township is entitled to the taxes collected in such territory, and if such taxes are received by another district may recover in an action at law the amount thus received within the statutory period of limitations: *District T'p v. Independent Dist.*, 80–495.

2900. Apportionment of taxes.

In an action upon the bond of a county treasurer to recover plaintiff's share of the general school fund, where it was shown by the evidence that the treasurer had received the money, and that in his settlement with the board of supervisors he represented that he had paid it to the plaintiff, and that he held a voucher for it issued by the county auditor in favor of plaintiff, but not countersigned by plaintiff's president and secretary, and that such warrant was delivered to the treasurer at his request a few days before the expiration of his term of office, and that plaintiff had never received the money, *held*, that an order directing a verdict for the defendant was not justified on the ground that an apportionment of the fund by the auditor had never been made, because the treasurer had represented to the supervisors that such apportionment had been made by claiming credit for the amount, and as to him the representation should be taken, *prima facie*, as true. And *held*, also, that such order was not justified by a showing that plaintiff had received in the aggregate for the years included in the treasurer's term of office and the succeeding year its full share of the fund, as the fact that plaintiff was overpaid would be a matter for adjustment between it and the county: *District T'p v. Espeset*, 75–500.

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2906. Judgments; orders.

The issuance of an order under this section does not constitute a payment of the judgment. Such orders do not constitute an independent evidence of indebtedness: *Richards v. Independent Dist.*, 46 Fed. R., 460.

2917. Restoration of territory.

Where prior to the enactment of the Code of 1873 districts had been organized and territory had been incorporated with another civil township as a school district, the adoption of the Code did not restore such territory to its own township, but the original district remained as before until restoration of the territory was made under the provisions of this section: *Hancock v. District T'p*, 78-550.

The provisions of the Code of 1873 did not affect the territory of districts or subdistricts formed from territory situated in different civil townships under previous statutes, and where territory had previously been legally attached to a district township, *held*, that it remained a part thereof: *District T'p v. Independent Dist.*, 80-495.

The policy of our law is, that the territory once organized for school purposes must always remain within some jurisdiction, and that it may not be detached from the jurisdiction to which it belongs without at the same time becoming a separate jurisdiction or a part of another jurisdiction for school purposes: *District T'p v. Independent Dist.*, 82-10.

Therefore *held*, that territory which had been for years a part of an independent district could not be, on petition of residents of such territory, set off by the board of the independent district for the purpose of establishing a new school district: *Ibid.*

The question as to whether certain territory shall be deemed part of the district township so that the district township is bound to furnish school facilities to such territory may be determined by action of *mandamus: Hancock v. District T'p*, 78-550.

2920. Territory included in independent districts.

This act does not prevent the addition to the independent district embracing the territory of a city or town of other territory of the district township out of which the independent district had been formed, by the proper action of the respective boards: *Independent Dist. v. District T'p*, 82-169.

2923. Election of directors in independent districts.

When the population of the district falls below five hundred, the number of directors should be diminished accordingly. If the population of the district be less than five hundred at the time of the election, two members should not be elected: *State v. Simpkins*, 77-676; *State ex rel. v. Vreeland*, 79-466.

2927. Directors; powers; division of district.

Under the provisions of this section, the amendment to § 2823, giving electors of district townships the power to authorize directors to obtain, at the expense of the district, highways for proper access to school-houses, is applicable to independent districts: *McShane v. Independent Dist.*, 76-333.

In view of the connection in which the provisions of this section were originally enacted it appears that it was designed to give to the electors of the independent district the same general powers as those conferred upon the electors of the district township: *Ibid.*

There is no authority in the board of an independent school district to sever territory forming a part of such district on a petition of residents of such territory, allowing such territory to remain unorganized, unless it can secure incorporation into some other school district: *District T'p v. Independent Dist.*, 82-10.

2933. Annual meeting of electors in independent districts.

The amendment to this section requiring the election to be by ballot implies that prior to such amendment the vote might be without ballot: *Seaman v. Baughman*, 82-216.

The legislature in amending this section evidently assumed that the preceding section referred to the administration of affairs of the independent districts by public officials rather than to the conferring of powers upon the electors, but this assumption the court holds not to be correct: *McShane v. Independent Dist.*, 76-333.

2933a. Loss of school building; special meeting of electors. 1807½ [24 G. A., ch. 21]. When an independent district, by fire or otherwise, has been deprived of a school building, and the board of directors of such district, by the use of the powers in them vested, are unable to provide for the continuance of the school for which such building has been used; then such board of directors shall call a meeting of such district. The manner of calling such meeting, and the powers of such meeting, shall be as follows:

First. The board of directors shall cause to be posted in three public places in such district, at least ten days prior to the designated time of hold-

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ing such meeting, written notices of such meeting, in which shall be stated the time and place of such meeting and the object or purpose for which the same is called.

Second. The powers of such meeting shall be the same as are prescribed in section 1807 hereof [§ 2933], except those powers which are set forth after the word "district" in the sixth line thereof.

2943. Boundaries of independent districts.

This section is applicable to independent districts formed out of the territory embraced in a city or town, as well as to others; and by concurrent act of the boards of the independent district and the district township from which such independent district was formed, territory of the latter may be added to the former: *Independent Dist. v. District T'p*, 82–169.

2968. Funding indebtedness.

If bonds are sold for the purpose of using the proceeds in the extinguishment of other bonds, the new issue creates an additional indebtedness, and if in excess of the constitutional limit they will be void (reversing 42 Fed. R., 644): *Doon Township v. Cummins*, 142 U. S., 366.

CHAPTER 12.

THE SCHOOL FUND.

3020. Rate of interest. 18 G. A., ch. 12, § 1; 23 G. A., ch. 23, § 1. The rate of interest of all permanent school funds hereafter loaned shall be six per cent. per annum from the date of said loan.

3021. Interest on interest. 18 G. A., ch. 12, § 2; 23 G. A., ch. 23, § 2. Interest not paid when due shall bear interest at the same rate as the principal.

3022. Interest charged to counties. 18 G. A., ch. 12, § 3; 23 G. A., ch. 23, § 3. After July 1, A. D. 1890, the counties having permanent school funds in control shall be charged only five per cent. instead of six per cent.

[The three preceding sections are substitutes, the rate of interest being changed.]

3022a. 23 G. A., ch. 23, § 4. Sections one, two, three of chapter twelve of the acts of the Eighteenth General Assembly [§§ 3020–3022] and all laws inconsistent with this act are hereby repealed.

3041. Action to recover, when barred.

Where money intended to be given in place of bail was paid to the sheriff, who was not authorized to receive it, *held* that, upon a forfeiture of bail, such money did not become a part of the school fund, and an action to recover the same would be barred by lapse of time: *State v. Farrell*, 49 N. W. R., 1038.

CHAPTER 13.

THE STATE LIBRARY.

3062. Assistants; salaries. 21 G. A., ch. 158, § 1; 24 G. A., ch. 60. The state librarian is authorized to employ to aid in the library one first assistant at a salary of six hundred dollars a year, one second assistant at a salary of five hundred dollars a year, and one third assistant at a salary of four hundred dollars a year.

[As amended to substitute a third assistant for a messenger, and increase the salary of such third assistant over that provided for messenger.]

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CHAPTER 14*a*.

HISTORICAL COLLECTION.

3072a. Rooms set apart. 24 G. A., ch. 56, § 1. The three southeast rooms in the basement story of the capitol building are hereby set apart for the purpose of containing the historical collections specified in this act.

3072b. Curator appointed; duties. 24 G. A., ch. 56, § 2. The trustees of the Iowa state library are hereby authorized and directed to appoint one person to be designated and known as curator of historical collections, who shall hold his office for six years and until his successor shall be appointed and qualified, whose duty it shall be, under and by the direction and authority of said board of trustees, to collect and arrange books, maps, charts, public documents, manuscripts and other papers and materials, illustrative of the history of Iowa in particular and of the west generally; to procure from early pioneer settlers narratives of their experience, exploits, perils and adventures; to procure facts and statements relative to the history, progress and decay of the Indian tribes, so as to exhibit faithfully and as far as practicable, the antiquities of the past; to procure books relating to the history and natural history of this state and of the central region of the continent of which it forms a part; to subscribe for and preserve files of at least two papers in each county of this state containing the official publications, and cause the same to be bound at the end of every four years; to thoroughly catalogue all such collections for convenient reference, and biennially to prepare for publication a report of all collections made under authority of this act.

3072c. Other material. 24 G. A., ch. 56, § 3. It shall further be the duty of the curator, with the approval of the said trustees, to collect memorials and mementos of the pioneers of Iowa and the soldiers of all our wars, including portraits, specimens of arms, clothing, army letters, commissions of officers, and other military papers and documents.

3072d. Ethnology and archæology. 24 G. A., ch. 56, § 4. It shall also be the duty of the said curator to receive and arrange in cases to be provided for that purpose, objects illustrative of the ethnology and prehistoric archæology of this and surrounding states; all duplicate specimens to be divided as equally as possible between the Iowa state university, Iowa agricultural college and state normal school.

3072e. Aldrich collection. 24 G. A., ch. 56, § 5. It shall be the duty of the custodian of the capitol building to proceed, under the direction of the trustees of the state library, to prepare and furnish the rooms named in section one [§ 3072*a*], for the purpose herein set forth, and then to remove to said rooms the cases and materials known as the "Aldrich Collection," which, together with such additions as may be made to it, shall thenceforth form a part of the collections herein contemplated.

3072f. Visitors. 24 G. A., ch. 56, § 6. It shall be the duty of said curator to keep said rooms, with the collections herein specified, open to the free inspection of the people during such hours every day, excepting legal holidays and Sundays, as the trustees of the state library may order and direct, provided nothing in this act shall be so construed as to exclude visitors to said rooms on Sunday afternoons during the sessions of the legislature.

3072g. Appropriation. 24 G. A., ch. 56, § 7. For the purpose of carrying out the provisions of this act, there is hereby appropriated from any funds in the state treasury, not otherwise appropriated, the sum of seven

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thousand five hundred dollars annually for the present biennial period, and thereafter annually the sum of six thousand dollars, out of which annual appropriation shall be paid all of the expenditures contemplated by section eight hereof [§ 3072*h*]. All accounts shall be audited by the executive council after being approved by the trustees of the state library.

3072h. Salary of curator. 24 G. A., ch. 56, § 8. The curator shall be paid the annual salary of twelve hundred dollars and allowed such assistance, postage, stationery and incidental expenses as the trustees may authorize and approve, as provided in the preceding section.

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TITLE XIII.

RIGHTS OF PROPERTY.

CHAPTER 1.

RIGHTS OF ALIENS.

3073. Non-resident aliens.

It is within the power of the state to declare and regulate the property rights of aliens with respect to property within the state: *Estate of Gill*, 79–296.

CHAPTER 4.

TRANSFER OF PERSONAL PROPERTY.

3094. Sales or mortgages; recording.

Change of possession: The possession of the person claiming personal property, as against a subsequent purchaser, must be visible, apparent and actual to strangers to the transaction: *Horsley v. Hairsine*, 77–141.

Therefore, where colts were purchased by defendant from his mother, but left in her possession on her farm, *held*, that the circumstances of the sale were not such as would indicate to a stranger that a change of ownership had taken place, and *held* also, that a failure to submit that question to the jury was prejudicial error: *Ibid.*

Under this section actual possession means a true, real, genuine, positive and certain possession, and not a virtual or theoretical possession. The mortgagor is in actual possession when he retains the property under his immediate personal supervision and control, though he employs others to aid in that control; but when the property is intrusted to the custody and control of another, although such person be his agent, if it is without the immediate personal supervision of the mortgagor, then the actual possession is in that other and not in the mortgagor, and in such case the mortgage will be valid without recording: *King v. Wallace*, 78–221.

Where plaintiff sought to recover possession of certain personal property under a chattel mortgage, and defendant's claim to the property was based on a chattel mortgage of prior date given by the plaintiff's mortgagor, and it was claimed that the first mortgage was invalid because the property had not changed possession at the time the mortgage was given to plaintiff, *held*, that as the question as to change of possession was being tried, defendant's mortgage was properly admitted in evidence: *Lansley v. Van Alstyne*, 81–476.

Where an arrangement was made between father and son, by which the father was to assume the son's debts and take the stock of the son's business, but the son remained in possession and carried on the business the same as before, *held*, that defendant, who acquired rights with reference to the property without knowledge of such arrangement, was not affected by such transfer: *McIntosh v. Wilson*, 81–339.

A party not having actual possession of property of which he becomes owner by bill of sale should cause the bill of sale to be acknowledged and recorded, as a protection against other persons acquiring claims on the property: *McMurray v. Hughes*, 82–47.

If the property sold was in the possession of the seller just before the sale, and no instrument evidencing the sale is properly recorded, evidence as to what there was afterwards to indicate a change of possession should go to the jury: *Wessels v. McCann*, 52 N. W. R., 846.

Innocent purchaser: Where the purchaser issued notes for the price, which were afterwards taken up, and new notes issued to the creditor of the payee of such notes, the original indebtedness of such payee to the creditor being extinguished, *held*, that such purchaser thus became a purchaser for value: *Norton v. Lumpkin*, 49 N. W. R., 1015.

Notice: An attaching creditor has no lien upon goods attached, prior to the levy, and if he has actual notice of an unrecorded mortgage before the levy, he is bound thereby: *Kern v. Wilson*, 82–407.

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Notice to a sheriff, before levying an attachment on the property, of the existence of an unrecorded mortgage, charges the attaching creditor with notice thereof: *Hibbard v. Zenor*, 82–505.

Where a chattel mortgage was given on an interest of a partner in a partnership, and the existence of such mortgage was known to a subsequent purchaser of such interest, *held*, that the chattel mortgagee had priority over such purchaser: *Cook v. Gilchrist*, 82–277.

Where it is claimed that a party who would otherwise have priority over a chattel mortgage had actual notice of such mortgage, the burden is on the one who relies on such fact to prove it by preponderance of evidence: *Carson & Rand Lumber Co. v. Bunker*, 49 N. W. R., 1003.

Where it is claimed that a party levying on property by attachment has actual notice of a chattel mortgage thereon, the mortgage is admissible in evidence, under an offer to follow it with proof of such notice: *Ordway v. Kittle*, 49 N. W. R., 1022.

Although the description of property in a mortgage is not sufficient to constitute constructive notice to others, it may be valid as against subsequent creditors levying on the property with actual notice to the creditor or the officer that the identical property is covered by the mortgage: *Coleman v. Reel*, 75–304; *American Well Works v. Whinery*, 76–400; *Cole v. Green*, 77–307; *Luce v. Moorehead*, 77–376; *Citizens' Nat. Bank v. Johnson*, 79–290.

And where a mortgage described "all crops growing and to be grown" on the land specified, and the land was afterwards sold, the purchaser having actual knowledge of the mortgage and the crop it was designed to cover, *held*, that the mortgage was good against the purchaser: *Luce v. Moorehead*, 77–367.

And where it appeared that during the negotiations for the sale plaintiff's agent had been furnished a statement showing certain mortgages on crops grown on the land, which were given to persons not parties to the action, and had full knowledge of such mortgages, *held*, that they were so much a part of the negotiations that they were properly introduced in evidence: *Ibid.*

And where plaintiff's attorney examined the chattel mortgage records before the contract of purchase was completed, and stated to her "the tenor and effect of the chattel mortgages," *held*, that she had actual notice of such mortgages: *Ibid.*

Description: Where a chattel mortgage described the mortgaged property as "one six 1-2 foot cut Plano harvester and binder," without other words of description, *held*, that it was insufficient to charge third persons with constructive notice: *Plano Mfg. Co. v. Griffith*, 75–102.

But where a mortgagee sought to recover of a constable for levying upon the mortgaged property, and it was shown that one of the execution plaintiffs had actual notice of the mortgage and of the property claimed under it, *held*, that parol evidence might be introduced to identify the property, and the mortgage itself was admissible in evidence: *Ibid.*

In an action by a mortgagee of property, against a constable who had levied upon the property, where the court had determined that the mortgage was void, and no claims could be asserted under it, *held*, that the fact that the record did not show that defendant had ever levied upon or sold the property would be no ground for an affirmance of the judgment: *Ibid.*

A chattel mortgage upon property including "our accounts," *held* to be too indefinite in its description of such accounts to constitute notice to a party taking such accounts by assignment: *Sperry v. Clarke*, 76–503.

The description in a bill of sale of a stock of goods and other personal property, *held* sufficient to cover property situated outside of the building in which the stock was included, but on the same lot, such description being sufficient to suggest inquiry which would lead to a knowledge of the existence of the goods in question, and it being the intent of the parties that such goods should be covered: *Towslee v. Russell*, 76–525.

A description of property in a mortgage as "one sorrel horse three years old," *held* not to be sufficient as against a purchaser of the property sought to be charged with constructive notice, even though the mortgage contained a recital as to the mortgagor's place of residence: *Barrett v. Finch*, 76–553.

Where the case was tried on the theory that the mortgagee's right to the property depended upon whether the record of his mortgage imparted constructive notice, he having alleged that the mortgage was duly recorded before plaintiff's purchase, *held*, that the burden of proof was not upon plaintiff to prove that he did not have actual notice of the existence of the mortgage: *Ibid.*

If the description contained in the mortgage is such that the mind is directed to evidence, whereby it may ascertain the precise thing conveyed, with absolute certainty, the instrument is valid, otherwise it is void as to third persons for uncertainty: *City Bank v. Ratkey*, 79–215.

Therefore where a mortgage described "eighteen head of two-year-old steers of various colors" by name as registered in the American Short-Horn Herd Book, and stated the place where such cattle were kept, *held*, that the description was sufficient to put third persons on inquiry that would have discovered the precise property: *Ibid.*

And where certain cattle were taken under a chattel mortgage, and a question was raised as to their identity with those described in the mortgage, the testimony of the person who took them from the farm, and of the owner as to the ages of the cattle, *held* to be sufficient to justify the submission of the question to the jury: *Ibid.*

A description in a chattel mortgage of certain horses by color, age and weight, and of vehicles by name, with a statement of where such property was kept, *held* to be a sufficient description: *Citizens' Nat. Bank v. Johnson*, 79–290.

If from the description contained in the mortgage the mind is directed to evidence whereby it may ascertain the precise thing conveyed, if thereby absolute certainty may

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be attained, the instrument is valid, otherwise it is void as to third persons for uncertainty: *Haller v. Parrott*, 82–42.

A party to the mortgage may testify as to whether the property in controversy is the same property upon which the mortgage was given for the purpose of identifying the property, and not for the purpose of aiding a defective description, as against third persons: *Ibid.*

The description in a chattel mortgage of personal property belonging to a partnership *held* sufficiently specific in a particular case, as between the parties to an instrument, and to all parties having notice of it: *Cook v. Gilchrist*, 82–277.

Where a chattel mortgage was given upon a "drug stock," *held*, that the court properly directed the jury that the mortgage covered all articles usually included in that term: *Kern v. Wilson*, 82–407.

A chattel mortgage of "the threshing machine accounts which we shall earn, or shall become due us by the work of the" machine, also covered by the mortgage, *held*, not sufficient to create any lien upon the unearned accounts, there being nothing to show the county or state in which they were to be earned, or the persons against whom they might accrue: *Sandwich Mfg. Co. v. Robinson*, 49 N. W. R., 1031.

A description is sufficient which will enable third persons, aided by inquiries which the instrument itself indicates and directs, to identify the property: *Ibid.*

A description, in a chattel mortgage, of an undivided two-thirds interest in certain crops, *held* sufficient: *Johnson v. Ridir*, 50 N. W. R., 36.

Where the description of a chattel mortgage included a general stock, and all other goods now on hand, or to be purchased and used in the business of a general millinery store, *held*, that such language included only such millinery goods as were on hand, or might be purchased for sale: *Chapin v. Garretson*, 52 N. W. R., 104.

Growing crop: A chattel mortgage on crops of grain to be grown, executed and recorded before the planting of the crops, continues to cover the grain after it is harvested and threshed, and the mortgagee can follow it into the hands of a purchaser to whom it has been sold in the ordinary course of business, and without notice of the lien, except such as is imparted by the record: *Wright v. Dickey Co.*, 49 N. W. R., 984.

Fixtures: Where a chattel mortgage was given on an elevator, machinery, etc., such elevator not being a part of the realty and being, therefore, treated as a chattel, *held*, that the term "fixture" used in the description of the property included a track scale, in connection with which were appliances for loading and unloading cars on such scale from the elevator: *McGorrisk v. Dwyer*, 78–279.

What instruments: A policy of insurance is not property in such sense that a transfer thereof is to be recorded under this section: *Aultman v. McConnell*, 34 Fed. R., 724.

The provisions of a lease subjecting exempt property to the landlord's lien are valid only as a chattel mortgage, and the instrument must be recorded as required in this section, to make it effectual against creditors and purchasers without notice: *Sioux Valley State Bank v. Honnold*, 52 N. W. R., 244.

A written instrument by which the mortgagor of personal property pledges his interest to a third person, giving him power to sell the same and apply the proceeds on certain indebtedness, will not entitle such person to the possession of the mortgaged property as against the mortgagee: *Parker v. Loan & Trust Co.*, 81–458.

In a particular case, *held*, that an instrument transferring certain property, including books of account, for the purpose of securing an indebtedness, was a chattel mortgage as to such books of account, as well as with reference to the other property, and not, as to them, an assignment only: *Sperry v. Clarke*, 76–503.

By partner: A mortgage made and signed by two of three members of a firm, and given to secure a partnership debt, where the third member makes no objection to the transaction, is valid between the parties even though it does not purport to be a mortgage by the partnership and the mortgagee believed the makers to be the only members of the firm: *Citizens' Nat. Bank v. Johnson*, 79–290.

And where it appeared that all the members of the firm assented to the giving of the mortgage, *held*, that the power of one member to bind the firm could only be questioned by the other partners or by some one claiming through them: *Ibid.*

By purchaser under contract: Where it appeared that mortgagor was in possession at the time of executing a mortgage under a contract giving him the right to purchase, but there was no evidence that he had exercised such right, *held*, that the mortgagee did not thereby acquire a lien as against the owner: *Bray v. Flickinger*, 79–313.

Place of record: A chattel mortgage should be recorded in the county where the mortgagor resides: *Haller v. Parrott*, 82–42.

Priority: Where one member of a partnership executed a mortgage upon his undivided one-half interest in the partnership property, to secure an individual debt, and subsequently purchased the other undivided one-half, of his partner, giving a mortgage upon the whole stock of goods to secure the purchase price, and when the stock was afterwards attached by other creditors and sold and the proceeds, which were less than the claims under the mortgages, placed in the hands of a receiver, *held*, that one-half the proceeds of the sale should be applied upon such claim: *Burdette v. Woodworth*, 77–144.

Where a horse power covered by a chattel mortgage securing the payment of two notes was given in exchange for a steam-engine, whereby the first of the two notes was at least partially paid, such note thereafter being transferred to the plaintiff, the last note having before maturity and prior to such exchange been transferred to defendant, a purchaser in good faith, *held*, that the claims of defendant were superior to those of plaintiff under the mortgage with reference to a threshing machine also covered by such chattel mortgage: *Massachusetts Loan & Trust Co. v. Moulton*, 81–155.

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3095. Index.

A party is not charged with constructive notice of a mortgage until the proper entries are made by the recorder in the index; and the fact that it is a custom of the recorder, when instruments are delivered to him to be recorded near the close of business on one day, not to enter them upon the record until the next day, will not change the rule as to notice: *Hibbard v. Zenor*, 75–471.

3098. Mortgagee entitled to possession.

The mortgagee is the owner of property covered by the mortgage and entitled to possession thereof in the absence of stipulations to the contrary: *Warder-Bushnell, etc., Co. v. Harris*, 81–153.

A chattel mortgage of property, the possession of which remains in the mortgagor, does not transfer an absolute and unqualified ownership: *Hollingsworth v. Holbrook*, 80–151.

A chattel mortgage is but a security for a debt, and the ownership remains in the mortgagor: *Taylor v. Merchants' & Bankers' Ins. Co.*, 49 N. W. R., 994.

A chattel mortgagee may maintain an action for possession under his chattel mortgage without producing the note secured thereby. Oral evidence of the indebtedness will be sufficient: *Hibbard v. Zenor*, 82–505.

Where persons were in possession of mortgaged personal property belonging to the mortgagor, as his agent, and were attached as garnishees, and after the garnishment another mortgage was given on the property, and it was then taken from the garnishees by virtue of the first mortgage, *held*, that the garnishees were properly discharged from liability, as they were under no obligation to pursue the property after it had been taken from them by due authority: *Booth v. Gish*, 75–451.

CHAPTER 5.

REAL PROPERTY.

3105. Declarations of trust.

Parol evidence to establish an express trust is not admissible: *Richardson v. Haney*, 76–101; *Andrew v. Concannon*, 76–251; *Brown v. Barngrover*, 82–204.

3108. Covenants.

Under a conveyance made prior to the enactment of this provision, in which the husband joined with his wife in conveying property of the wife, *held*, that the husband was liable on the covenants of the deed: *Bellows v. Litchfield*, 48 N. W. R., 1062.

3109. Mortgagor retains possession.

Section applied: *Watts v. Creighton*, 52 N. W. R., 12.

3110. Tenancy in common.

A conveyance to father and son will constitute them tenants in common of the property conveyed: *Bolton v. Oberne*, 79–278.

3111. Vendor's lien.

The right to this lien being limited to unpaid purchase-money, it will not be sustained when the purchase price has been so blended with other considerations by the contract, or otherwise, that its precise amount cannot be ascertained. Therefore *held*, that an amount due on the settlement of various claims, including the purchase price of real estate, although such balance did not exceed the amount of the purchase price, could not be enforced and made the basis of a vendor's lien: *Erickson v. Smith*, 79–374.

The provisions of this section are not applicable to cases where the vendor's lien is based on a contract enforceable in equity, and such a lien will take precedence of a judgment: *Devin v. Eagleson*, 79–269.

Where a party orally agreed to give a mortgage for the purchase price of real estate, in which it was provided that the mortgagor should pay the accruing taxes, and in consideration of such agreement the property was conveyed to him, but he failed to execute the mortgage or to pay the taxes, which were paid by the vendor, *held*, that there was such a part performance as to take the case out of the statute of frauds; and *held*, also, that as between the parties the vendor was entitled to a lien according to the terms of the mortgage for the unpaid purchase-money and interest and the taxes paid by the vendor: *Ibid.*

And where third parties claimed to have extended credit to the purchaser on the faith of his property and without any knowledge of the lien, *held*, that the claim was not well founded, as it appeared that the deed to the purchaser was not recorded until long after the date of the last item of the account: *Ibid.*

A quitclaim deed is sufficient to bar a vendor's lien not evidenced by writing: *Chrisman v. Hay*, 43 Fed. R., 552.

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CHAPTER 6.

CONVEYANCE OF REAL PROPERTY.

3112. Instruments affecting, recorded.

Assignment: The assignment of a mortgage is such an instrument as may be recorded under this section: *Kenosha Stove Co. v. Shedd*, 82–540.

Who protected: Mortgagees of real property are deemed purchasers under the recording acts: *Estate of Gill*, 79–296; *Weare v. Williams*, 52 N. W. R., 328.

A judgment creditor who purchases real estate at a sale under execution, in the absence of notice of an outstanding equity, is an innocent purchaser for value and is entitled to protection as such: *Ettenheimer v. Northgraves*, 75–28.

A purchaser in good faith for a cash consideration cannot be held subject to a claim against his grantor to enforce a parol trust with reference to the land conveyed: *Richardson v. Haney*, 76–101.

An unrecorded deed will take precedence over a subsequent attachment or judgment, though the creditor had no notice thereof: *Moorman v. Gibbs*, 75–537.

Mere creditors cannot object on account of failure to record: *Weare v. Williams*, 52 N. W. R., 328.

The holders of a void title cannot take advantage of want of notice of a valid conveyance: *Chase v. Kaynor*, 78–449.

For a consideration: A petition to set aside an execution sale of land alleged simply that defendant purchased the property at the sheriff's sale and had obtained a deed to it, and that she had actual and constructive notice at the time of plaintiff's rights. *Held*, that the averment that she purchased the land was equivalent to an averment that she had paid the amount of the bid and was a purchaser for value: *May v. Sturdivant*, 75–116.

With notice: Where a conveyance of land was executed and acknowledged in another state, but the form of acknowledgment was not sufficient in this state, *held*, that subsequent purchasers, claiming under a second deed from the same grantor, who had actual knowledge of the prior conveyance, and who paid nothing for their interest, or took as security for a prior debt, would not be protected against those claiming under the first deed: *Walker v. Abbey*, 77–702.

Where a person having a homestead right in property conveyed the same to his daughter, without the signature of his wife to the deed, and after the death of the parents the daughter conveyed the same to plaintiff, who had been acquainted with the family for a number of years, and knew that the premises had been occupied as a homestead, and where it appeared that plaintiff had required a quitclaim deed from the other heirs, and knew of the unsatisfied claim of defendants, in an action by defendants to subject the land to the lien of a judgment, *held*, that plaintiff was not entitled to protection as an innocent purchaser: *Bolton v. Oberne*, 79–278.

Where a prospective purchaser has actual knowledge of the record and of facts that would suggest to an ordinarily careful and prudent man that there was a mistake in the record, he is affected thereby, although he would not be bound if he had only constructive knowledge of the record: *Shoemake v. Smith*, 80–655.

Knowledge or notice of facts acquired by an attorney or agent when engaged properly in the business of his client or principal becomes, in law, the knowledge or notice of such fact to client or principal: *Ibid.*

Possession by a grantor after full conveyance is not constructive notice to subsequent purchasers of any right reserved in the land by the grantor, and where one is in possession under some right which appears of record, his possession is not constructive notice of another or different right, but is referable to that right: *May v. Sturdivant*, 75–116.

Therefore, where several co-tenants were in possession of land and purchased the interest of another co-tenant, who had never been in possession, but failed to record the deed, and there was no change in the possession after the purchase, except that certain improvements were made upon the land, *held*, that such possession was not sufficient to give constructive notice of the additional right acquired under the deed: *Ibid.*

Where the grantee was the mother-in-law of the grantor, and residing in his family, and to some extent carrying on the business of the farm, *held*, that her possession of the farm was not such as to give notice to third persons of rights acquired by her under a conveyance thereof unrecorded: *Elliot v. Lane*, 82–484.

A mortgagee in possession of such facts as would put a reasonably prudent man upon inquiry will be bound by whatever such inquiry would have disclosed, but the proof must be clear and decisive: *Weare v. Williams*, 52 N. W. R. 328.

A party acquiring his rights under a quitclaim deed is deemed to take with notice of prior unrecorded instruments and is not protected with reference thereto: *Steele v. Sioux Valley Bank*, 79–339.

Therefore *held*, that a purchaser by quitclaim would not be protected as against a prior unrecorded bond for a deed given as security (overruling *Pettingill v. Devin*, 35–353): *Ibid.*

A quitclaim deed is sufficient to cut off a vendor's lien not evidenced in writing as required by § 3111: *Crisman v. Hay*, 43 Fed. R., 552.

Constructive notice: The recording of a real estate mortgage will not give constructive notice of a provision therein that the rents of the property are pledged to the payment of a debt: *Trulock v. Donahue*, 76–758.

Priority: Mortgages which are executed at the same time, recorded at the same hour,

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and foreclosed on the same day, are equal liens in point of time, neither taking priority over the other: *Stanbrough v. Daniels*, 77–561.

In an action by a junior mortgage holder for the foreclosure of his mortgage and for permission to redeem from prior mortgages, where it appeared that the time of payment had been extended on both the senior mortgages, and it did not appear that the plaintiff had notice of these extensions of time either when he took the mortgage or before the action was commenced, *held*, that the relief asked by plaintiff should be granted, as the holders of the prior incumbrances would not be permitted to unite with the mortgagor and so change the contract that it would prejudice subsequent incumbrancers, having neither actual nor constructive notice of the change: *Wheeler v. Menold*, 81–647.

Where land previously mortgaged was conveyed to plaintiff in consideration of an antecedent debt before the recording of the mortgage, but where there was evidence that he had actual knowledge of its existence and where he was negligent in asserting his rights for more than thirty years, allowing others to acquire title under the mortgage, *held*, that all the circumstances of the case would give rise to a strong presumption against him and he would not be permitted to claim title adverse to those claiming under the mortgage: *Witherow v. Walker*, 81–651.

One who takes a conveyance with payment of purchase-money partly in cash and partly by note secured by mortgage takes priority over a former vendee under an executory contract to purchase, to whom no deed has been executed; and it is immaterial that the acknowledgment of the conveyance to the latter purchaser is defective: *Walker v. Cameron*, 78–315.

3117. How recorded.

Where the claimant of property traced title to one Teufel, but the record of the conveyance was ambiguous in the spelling of the name, and might be read Temple, but there was no showing that the opposite party had been misled by the condition of the record, *held*, that the title of the claimant was sufficiently established: *Soreson v. Davis*, 49 N. W. R., 1004.

3128. Acknowledgment.

A county officer executing a conveyance under authority of law for the county may acknowledge such conveyance in a county other than that for which he is acting: *Henderson v. Robinson*, 76–603.

3131. Certificate of acknowledgment.

The omission of the word "voluntary" or its equivalent in a certificate of acknowledgment is a fatal defect, and the record of an instrument thus acknowledged does not impart constructive notice to a subsequent purchaser: *Kreuger v. Walker*, 80–733.

No specified form of acknowledgment is required where one member of a firm mortgages property to secure a partnership debt; and in a particular case, *held*, that an acknowledgment by "Frank Johnson, a member of the firm of A. T. Johnson Son Co.," was a sufficient acknowledgment: *Citizens' Nat. Bank v. Johnson*, 79–290.

3139. Legalizing acts.

Where it is claimed that under such a legalizing act a defective acknowledgment is made valid because it was made in accordance with the laws of the state where it was executed, its sufficiency under the laws of such state must be shown: *Kreuger v. Walker*, 80–733.

3141. Recording without acknowledgment legalized.

Section applied: *Henderson v. Robinson*, 76–603; *Collins v. Valleau*, 79–626.

3141a. Legalizing act extended. 24 G. A., ch. 42. Section 1967 of the Code of 1873 [§ 3141] is amended by striking from the third line thereof the words, "thirteenth day of April, 1872," and inserting in lieu thereof the words, "first day of February, 1892," provided that this act shall not apply to cases where vested rights have accrued nor to cases now in litigation.

3145. Form of quitclaim.

The instrument here given contemplates a conveyance only of the interest of the grantor, whatever it may be, and a purchaser by such conveyance takes with notice of any prior unrecorded instruments, or equities available against his grantor: *Steele v. Sioux Valley Bank*, 79–339.

And see notes to § 3112.

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CHAPTER 7.

OCCUPYING CLAIMANTS.

3151. Proceedings by.

As against the claimant for improvements, the owner is entitled to sue for the value of the use and occupation of the land by the claimant prior to the rendition of the judgment, no allowance for such use and occupation having been made in the original judgment: *Welles v. Newsom*, 76–81.

In determining the value of the improvements, the claimant should have, not what the improvements cost, but the value thereby imparted to the land: *Ibid.*

Where defendant built a house on certain lots owned by another with the understanding that a contract of sale might be completed, but which never was completed, and where the owner of the lots afterwards sold them to plaintiff's grantor for their value without the house, and plaintiff purchased them for a still smaller sum, both plaintiff and his grantor purchasing with full knowledge of all the facts, *held*, that defendant's remedy was not by proceeding under the law applicable to occupying claimants, but that equity could give full relief and quiet the title to the lots in plaintiff, and defendant would be given thirty days in which to remove the house: *Green Bay Lumber Co. v. Ireland*, 77–636.

A court of equity having acquired jurisdiction in an action for partition has power to afford equitable relief to one of the parties who has made improvements for which he is entitled to compensation as occupying claimant: *Killmer v. Wuchner*, 79–722.

Where plaintiff had judgment for recovery of premises from defendant under a tax deed, and defendant appealed from such judgment, claiming it to be erroneous because the action was barred by the statute of limitations, *held*, that although the judgment was sustained on the appeal, the action of the lower court in refusing to issue a writ of execution was not erroneous and that the cause would be remanded, and that defendant would have the opportunity to interpose his claim for improvements: *Strabala v. Lewis*, 80–510.

The rule of this and the following sections as to the valuation of improvements has no application to a case where redemption is made by one who has taken possession of and improved property under a conveyance which is afterwards adjudged to be a mortgage: *Gleiser v. McGregor*, 52 N. W. R., 866.

3158. Occupancy.

Where a person in possession seeks to recover for improvements made on the premises of another, and his only color of title is that acquired by reason of occupation, such occupation must have continued for five years before the bringing of the action in which the improvements are claimed: *Welles v. Newsom*, 76–81.

Neither is claimant entitled to compensation for improvements put upon the land after the filing of the petition in the action in which compensation for improvements is sought, such claimant having had notice of the commencement of the action. Improvements made after such notice cannot be regarded as made in good faith under color of title based on possession only: *Ibid.*

Evidence as to the value of improvements made by the occupant before acquiring color of title by occupation, even though he remains in occupation long enough to acquire color of title afterwards, is not admissible. Such improvements become the property of the owner of the land and the occupant cannot recover their value: *Snell v. Mechan*, 80–53.

CHAPTER 8.

HOMESTEAD.

3163. Exempt.

The law undertakes to guard the homestead for the family, not alone for the owner; and where the homestead was liable for a portion of an indebtedness because it was contracted prior to its acquisition, *held*, that in the application of payments to such indebtedness, in the absence of any application by the parties, the law would relieve the homestead from liability: *First Nat. Bank v. Hollinsworth*, 78–575.

A homestead right in land owned by tenants in common may be acquired by one of the co-tenants: *Bolton v. Oberne*, 79–278.

Where two brothers, one of them married, entered and occupied large tracts of land as owners in common, and subsequently became indebted as partners in a distinct transaction, and the portion of the premises not included in the homestead were sold in payment of debts, and the unmarried brother conveyed to the widow of the married brother his interest in the portion occupied by the latter as a homestead, *held*, that such premises were not subject to partnership debts: *Fordyce v. Hicks*, 80–272.

In determining the solvency of a partner-

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ship doing a banking business, *held*, that the homesteads of the partners, reserved by them from an assignment for the benefit of creditors, were not to be taken into account as assets: *State v. Cadwell*, 79–432.

As to debts which are not enforcible against the homestead, a conveyance of the homestead from husband to wife will not be deemed fraudulent: *Payne v. Wilson*, 76–377; *Beyer v. Thoeming*, 81–517.

In an action to subject a homestead owned by the husband to the payment of a judgment, the wife has such an existing interest as entitles her to intervene and protect the homestead by claiming the exemption: *McClure v. Braniff*, 75–38.

Where a homestead owned by a husband is used by him for the unlawful sale of intoxicating liquors, it is liable for all fines, costs and judgments rendered against him for such illegal sale, and the fact that the unlawful use is without the consent of the wife will not exempt the homestead from such liability, when the husband is the owner: *Ibid.*

Where the husband alone is made party to a foreclosure proceeding and fails to set up therein a homestead right he cannot do so in an action of forcible entry and detainer, in which it is sought to get possession of the premises in pursuance of such foreclosure. The fact that the wife was not a party to the foreclosure will not give to the husband any greater right to make defense than he would have had in the original foreclosure proceeding: *Dodd v. Scott*, 81–319.

The rights of the wife in the homestead are such that she may maintain an action to recover possession thereof if such possession is surrendered by the husband under a contract of sale in which she has not joined, and if she does not bring such action within the statutory period, the adverse possession will bar any action by her: *Boling v. Clark*, 50 N. W. R., 57.

3165. Conveyance or incumbrance.

An agreement to convey a portion of a tract of land which might be a part of the homestead, the homestead not having been platted, is not valid unless husband and wife join therein: *Woolcut v. Lerdell*, 78–668.

Where co-tenants conveyed land, in which one of them had a homestead right, to a third party, and the wife of the party owning the homestead right failed to join in the deed, *held*, that the conveyance of the undivided interest was of no validity, and any one interested in the property it attempted to convey might question it: *Bolton v. Oberne*, 79–278.

In a particular case, *held*, that a mortgage on the homestead was sufficiently definite without reformation to be effectual, and that therefore the question as to whether such an instrument could be reformed in equity did not arise: *Shoemake v. Smith*, 80–655.

The wife has the right to assert her homestead claim independently of the acts of the husband, and such right cannot be taken from her by any act of the husband in recognizing the title of an adverse claimant—for instance, one who claims to hold a tax title: *Beedle v. Cowley*, 52 N. W. R., 493.

The assignment by the wife of a contract under which she holds premises occupied by herself and husband as a homestead and in the assignment of which the husband does not join will not constitute a valid transfer of the contract, and the fact of subsequent abandonment of the homestead will not make such assignment valid: *Belden v. Younger*, 76–567.

Possession taken under a contract of sale of the homestead, made with the husband, and continued for the statutory period, will become a perfect title as against the wife: *Boling v. Clark*, 50 N. W. R., 57.

A transfer of the homestead, assented to by both husband and wife, followed by change of possession and the performance of the agreement under which the transfer is made, operates to transfer an equitable title, and is an abandonment of the homestead: *Winkleman v. Winkleman*, 79–319.

So *held*, where land was by a father, with the consent of his wife, transferred to his son as an advancement, and occupied and improved by the son, as such: *Ibid.*

Where plaintiff, a married woman, under an oral contract, took possession of her mother's house and furnished support to the mother and mother's husband during the mother's life, in consideration that she should have the property at her mother's death, *held*, that by the act of occupancy by plaintiff, the property became her homestead, and her mother's homestead rights terminated, and the oral contract consummated on the mother's part by abandonment was sufficient to convey the homested: *Drake v. Painter*, 77–731.

Where prior to his marriage the owner of premises for the purpose of defrauding creditors conveyed the same to another, and then upon marriage occupied the premises under lease as a homestead, and executed mortgages thereon by virtue of a power of attorney from the grantee, *held*, that the wife of such grantor could not object to the conveyance as not having been joined in by her: *Johnston v. McPherran*, 81–230.

In such case, *held*, also, that a conveyance by the husband and wife to the original grantee, made after the execution of the mortgages, for the purpose of correcting the former conveyance, was sufficient to convey the wife's homestead interest: *Ibid.*

Where a farm was owned by a wife and she and her husband occupied a dwelling-house on the premises for several months, when the husband left the state because of some criminal offense, and the wife afterwards conveyed the farm by warranty deed to plaintiff's grantor, the husband conveying his interest by quitclaim deed after his return to the state, and both husband and wife subsequently conveyed the property to defendant by a joint quitclaim deed, and where it appeared that there had never been any claim that the property was regarded as a homestead, that no homestead plat had been made, and that plaintiff purchased the land for a full consideration and took and held possession for more than three years before the defendant had acquired any interest therein, and that defendant had full

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knowledge of all these facts before the conveyance to himself, *held*, that the separate conveyances from the husband and wife were sufficient to convey their title to the land, and that defendant having notice of plaintiff's rights acquired no title to the property by the joint conveyance: *Corbin v. Minchin*, 81–682.

In an action to declare a certain mortgage null and void on the ground that at the time it was signed by plaintiff and delivered to defendant it contained no description of any property, and that the husband of plaintiff afterwards inserted the description of their homestead, *held*, that the validity of the mortgage could not be questioned, as plaintiff failed to show by a preponderance of the evidence that the mortgage did not contain a description of the homestead when she signed and acknowledged the same: *Harding v. Des Moines Nat. Bank*, 81–499.

3167. For debts antedating purchase.

A homestead may be sold for debts contracted prior to its acquisition, unless it is acquired with the proceeds of a prior homestead: *Lamb v. McConkey*, 76–47.

Where the owner of the homestead sought to enjoin the sale thereof for an indebtedness due the bank, from which he had procured the money to purchase such homestead, *held*, that the deposit by such debtor of trust funds on general account in excess of the overdraft for money used in purchasing such homestead constituted payment, the nature of the fund being known to the bank and they having accepted it without objection, and that therefore the homestead was exempt: *Hale v. Richards*, 80–164.

Where fifty-five acres of land were sold under a judgment for a debt contracted prior to the occupancy of the land as a homestead, and where plaintiff before the sale designated forty acres as the homestead, and the fifteen acres were sold first, *held*, that the sale was valid, although the sheriff's return failed to show which parcel was first offered for sale: *Smith v. De Kock*, 81–585.

3168. Debts by written contract; deficiency.

Where a mortgage covered a tract of land belonging to the husband and also a tract belonging to the wife, that of the husband being the homestead, *held*, that a release by mortgagor of the land of the wife, it being greater in value than the amount of the mortgage debt, would preclude the foreclosure of the mortgage on the homestead: *Bockholt v. Kraft*, 78–661.

3169. What constitutes.

Separate tracts: Where a house occupied by the family as a home was situated partly on a tract of forty acres belonging to the husband and partly on another tract belonging to the wife, *held*, that the forty-acre tract belonging to the husband could not be held exempt in its entirety as the homestead: *Henderson v. Rainbow*, 76–320.

Occupancy: There must be actual occupancy to give the homestead character: *First Nat. Bank v. Hollingsworth*, 78–575.

A part of a building may be subjected to the payment of a judgment while the remainder is exempt as a homestead: *McClure v. Braniff*, 75–38.

Occupancy of rooms in a building in connection with the keeping of a hotel is not inconsistent with their occupancy by the family for the purposes of a homestead: *Cass County Bank v. Weber*, 48 N. W. R., 1067.

Where portions of the building not used as a homestead are accessible only through the part that is exempt as a homestead, the portion not thus used cannot be sold under execution, as the purchaser would get but a barren right. The court could not in such case compel the owner of the homestead to allow a right of access to the portion of the premises not exempt: *Ibid.*

Under particular facts, *held*, that there was such occupancy of the premises as to invest them with a homestead character: *Woolcut v. Lerdell*, 78–668.

Abandonment: A conveyance of the homestead in the form of a deed, but which is in fact a mortgage, as security for money borrowed of the grantee, does not affect the homestead rights of the husband and wife: *McClure v. Braniff*, 75–38.

Where plaintiff left her homestead and went to visit her daughter, remaining away eight months, in the meantime renting her home in which she had left part of her furniture, *held*, that there was not an abandonment in the absence of testimony that plaintiff ever expressed an intention not to return to the homestead: *Jones v. Blumenstein*, 77–361.

The fact that due notice is given of an execution sale of the homestead will not prevent the owner asserting his right thereto as against a purchaser at such sale: *Ibid.*

Evidence as to what third parties had said as to plaintiff's intention to return to the property and what the purchaser believed about it when he purchased it, *held* inadmissible against the owner to prove abandonment: *Ibid.*

Where property claimed as a homestead had been sold under execution, and it was established that plaintiff ceased to occupy the property three years before the sale and that he directed the sheriff to levy upon and sell it; that he did not commence the action to set aside the sheriff's deed until five years after the sale was made, the purchaser in the meantime collecting the rents, and that he had established his home elsewhere before the commencement of the action, *held*, that the facts were sufficient to constitute an abandonment, notwithstanding his testimony that he did not intend to abandon his home: *Wilson v. Daniels*, 79–132.

Where another home was purchased and occupied for a short time, but no payments

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thereon were made, *held*, that this fact did not show an abandonment as against the clear preponderance of evidence that the party did not intend such abandonment: *Ayres v. Griel*, 51 N. W. R., 14.

Under the facts of a particular case, *held*, that by leasing the homestead and then abandoning such lease and accepting other provisions made in an ante-nuptial contract, the widow abandoned her homestead right: *Ditson v. Ditson*, 52 N. W. R., 203.

3170. Embraces what.

Where the house occupied by the family as a home is situated in part on each of two tracts, one belonging to the husband and the other to the wife, a part of each tract must be included in the homestead: *Henderson v. Rainbow*, 76–320.

3171. Extent.

The policy of the statute has been not to place restrictions on the value of the homestead within the limitations here allowed, and *held*, that in determining the application of payments so as to relieve the homestead from liability for the portion of an indebtedness contracted prior to its acquisition, which was also a lien on other property, the extent and value of the homestead would not be taken into account: *First Nat. Bank v. Hollinsworth*, 78–575.

A homestead consisting of between four and five acres of land, part of which is within the city limits, but is not platted into town lots, is not subject to execution: *Beyer v. Thoeming*, 81–517.

A lot, within the provisions of this section as to the extent of the homestead, is a tract of land designed for use for town purposes, and not one which is by the platting reserved for further subdivision: *Frost v. Rainbow*, 52 N. W. R., 198.

3172. Dwelling; appurtenances.

Where there were three rooms in the first story of a building, and the front room was used exclusively for business purposes and the middle room partly for business and partly for family use, while the back room and the entire upper story were used by the family, *held*, that the front and middle rooms were so far devoted to business purposes as to lose the homestead character, except as they were appurtenant to the homestead: *McClure v. Braniff*, 75–88.

3173. Selection and platting.

The husband and wife have the same right to select the homestead on the land of the wife, if it be occupied for homestead purposes, as they have to select it when the husband's land is occupied for such purpose; therefore, where the house occupied by the family as a home was situated in part on a forty-acre tract belonging to the husband, and in part on another tract belonging to the wife, *held*, that the entire tract belonging to the husband could not be claimed as exempt, but the homestead must be selected and marked out upon both: *Henderson v. Rainbow*, 76–320.

Where the homestead is not platted a conveyance of a portion of the tract which might be a part of the homestead will not be valid unless both husband and wife join therein: *Woolcut v. Lerdell*, 78–668.

It is not necessary that the premises selected as a homestead correspond with a government subdivision of forty acres, but the selection may be made in such way from a larger tract as to include the buildings used in connection with the homestead, although they be on different subdivisions: *Schlarb v. Holderbaum*, 80–394.

Where forty acres of land and fifteen acres adjoining, all of which was occupied as a homestead by plaintiff, were sold under an execution, and plaintiff served a notice on the sheriff before the sale, claiming the forty-acre tract as a homestead, *held*, that the notice was, under the law, as definite as a platting would have made it, and an omission to plat the homestead was without prejudice and would not invalidate the sale: *Smith v. De Kock*, 81–535.

3175. Changes.

Where the proceeds of the sale of a homestead are invested in lands in another state, which land is subsequently exchanged for land in Iowa, the property thus acquired in Iowa is not covered by the homestead exemption: *Dalton v. Webb*, 50 N. W. R., 58.

3183. Election to retain as dower; descent.

Occupancy of the homestead by the surviving husband or wife will be regarded as an election to retain the homestead for life in lieu of dower, until the distributive share of such survivor is set apart: *McDonald v. McDonald*, 76–137.

Until a distributive share is set apart, a surviving husband or wife occupying the homestead must be regarded as having elected to take it as a homestead and not to take a distributive share or the provisions made for her in a will. In such event the widow has not any interest or estate in the homestead such as will pass to her heirs at her death: *Schlarb v. Holderbaum*, 80–394.

The fact that the occupancy includes premises in addition to the homestead will not show that the occupation is not intended to be that of the homestead, nor will the failure to have the homestead platted affect such occupancy: *Ibid.*

The primary right is to have the distributive

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share, and that right continues until it is superseded and set aside by an election to take the homestead in lieu thereof. And the occupancy of the homestead for a reasonable time under circumstances making removal therefrom impracticable will not constitute an election to retain the homestead in lieu of dower: *Egbert v. Egbert*, 52 N. W. R., 478.

Where a testator gave his wife an undivided one-third of the homestead property, and the remaining two-thirds to his daughter, *held*, that it was evidently not the intention of the testator to give his wife one-third in fee-simple, in addition to the right which she might claim to occupy the premises as her homestead during her life-time: *Larkin v. McManus*, 81–723.

The heirs hold a homestead free from the debts of the ancestor, which in his life-time could not be enforced against it, and also hold it exempt from their own debts contracted prior to the death of the ancestor, and they so hold it even though they do not take possession of and occupy it: *Kite v. Kite*, 79–491.

The exemption of the interests of the heirs in the homestead from liability is not because of any homestead right they have in the premises, but because of the homestead right of their ancestor: *Ibid.*

Although the distributive share of the widow is by § 3645 to be set out so as to include the homestead, yet where the real property of deceased is sold for the purpose of setting off the widow's interest under § 3655, creditors have not the right to compel the widow's share to be taken entirely from, or to entirely include the proceeds of, the homestead for the purpose of preventing the exemption of such proceeds in the hands of the heirs: *Ibid.*

CHAPTER 9.

LANDLORD AND TENANT.

3188. Attornment.

A tenant is under no obligation to pay rent after the premises have been sold, and a sheriff's deed issued under foreclosure of a mortgage which has priority over the title of such landlord, and he is bound to account for pasturage and crops converted by him after the purchaser becomes entitled to possession under his sheriff's deed: *Stanbrough v. Cook*, 49 N. W. R., 1010.

3189. Tenant at will.

The presumption obtaining at common law that a party holding over after the expiration of his lease becomes a tenant from year to year is overcome by this statutory provision making him a tenant at will: *O'Brien v. Troxel*, 76–760.

Where defendant claimed under a verbal lease for three years, which was invalid on account of the statute of frauds, *held*, that he was not thereupon entitled to be considered a tenant at will, and possession could be recovered from him by the landlord without thirty days' notice: *Burden v. Knight*, 82–584.

3190. Notice to quit.

A field tenant, or cropper, has no right of pasturage either before or after the crop is harvested: *Kyte v. Keller*, 76–34; *Tantlinger v. Sullivan*, 80–218.

Where in an action to recover possession of real property defendant set up a lease which plaintiff claimed to be void, *held*, that plaintiff could not recover even though the lease should be void, because it did not appear that the right of possession of defendant had been terminated by proper notice: *Lee v. Lee*, 50 N. W. R., 33.

3192. Landlord's lien.

Subtenants having knowledge that their lessor is a tenant are chargeable with knowledge of the terms by which he holds the premises and are bound by them; and where the original lease gave to the landlord a lien upon crops grown upon the premises for rent at any time remaining unpaid, *held*, that such lien attached to crops grown by the subtenant: *Foster v. Reid*, 78–205.

While the wife may be liable for the rent of premises leased to the husband, on the ground that such rent constitutes a family expense, her property cannot be taken under a landlord's attachment by virtue of such lease for rent not yet accrued: *Schurz v. McMenamy*, 82–432.

Where the landlord knows that grain raised on the premises and covered by his lien is being sold to an innocent purchaser and makes no objection, he will be estopped from asserting his lien as against such purchaser: *Wright v. Dickey Co.*, 50 N. W. R., 206.

The right of the landlord to an injunction to prevent the removal of property to the diminution of his lien, *held* not to be applicable to a case where the property consisted of machinery of a water-works company which was about to be removed to other premises, and would still remain subject to proceedings by the landlord to enforce his lien when the rent for which the lien was claimed should fall due: *Carson v. Electric Light & Power Co.*, 51 N. W. R., 1144.

A provision in a lease creating a lien on

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property exempt from execution is in its nature and effect a mortgage and not a mere waiver of the right to claim an exemption, and as a mortgage, such lease must be recorded, in order to be valid against existing creditors, or subsequent purchasers without notice: *Sioux Valley State Bank v. Honnold*, 52 N. W. R., 244.

CHAPTER 10.

WALLS IN COMMON.

3194. What constitutes.

The provision authorizing the construction of party-walls was evidently intended to apply to the party who desires to erect a building on the lot adjoining a lot which is vacant, so that when a building shall be erected on the vacant lot the wall may be used in common. And it does not authorize the erection of such a wall where, if erected, it will destroy a stairway or other improvement on the adjoining land: *Cornell v. Bickley*, 52 N. W. R., 192.

An agreement by which a cellar wall may be erected on the line, *held* not to imply the right to carry the wall of the building above the ground so as to destroy a stairway already existing in the adjoining building: *Ibid.*

A wall may be made a wall in common by the adjoining owner contributing one-half of the expense of building the wall at the time, or paying one-half of the appraised value afterward. The mere incidental benefit or protection afforded by the wall of one proprietor to the wall of his adjoining proprietor, by reason of which the latter is preserved and may be constructed of inferior material, is not such use as to make a wall in common: *Sheldon Bank v. Royce*, 50 N. W. R., 986.

3198. Use of.

This section indicates that to use a wall in common is to make it in some way a part of the building for which it is used, and not simply a protection to an adjoining wall: *Sheldon Bank v. Royce*, 50 N. W. R., 986.

3202. Paying for share.

A contract in a particular case with reference to a wall in common, considered, and *held* not to be designed as a substitute for the statute, but to be in harmony therewith: *Freeman v. Herwig*, 51 N. W. R., 169.

A person building a wall on the line, having extended his cornice across the entire front of the wall, *held*, that the adjoining owner, on becoming entitled to one-half of the wall, might cut the cornice off at the dividing line: *Ibid.*

3205. Agreements.

If an arrangement between the parties with reference to the wall is not such as the law in the absence of such agreement would have made, it is special, and is within the rule of this section: *Price v. Lien*, 51 N. W. R., 52.

An adjoining lot-owner is not, by the contract which the law makes for him, required to join in the construction of such a wall: *Ibid.*

Part performance as contemplated in § 4916 will not validate a parol agreement which would not be valid under the provisions of this section. A special agreement in regard to a party-wall cannot be deemed a contract for the creation of an interest in land under that section: *Ibid.*

It is the legislative intent that agreements as to walls in common shall be those arising by the operation of the statute in the absence of those written and signed by the parties: *Ibid.*

CHAPTER 11.

EASEMENTS IN REAL ESTATE.

3206. Adverse possession; use.

Proof of use may show dedication as well as prescription, and where both were claimed as showing a highway, *held*, that evidence of the use was proper: *Duncombe v. Powers*, 75–185.

Where plaintiff turned water from his land so that it flowed upon the land of the defendant to his injury, *held*, that plaintiff had acquired no right to the flow of water as changed, by prescription, although the stream was diverted more than ten years before the action was commenced, in the absence of evidence that defendant had express notice, other than the mere use, that plaintiff's claim was adverse: *Preston v. Hull*, 77–309.

3211. Provisions not retrospective.

Section applied: *McAllister v. Pickup*, 50 N. W. R., 556; *Ague v. Seitsinger*, 52 N. W. R., 228.

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TITLE XIV.

TRADE AND COMMERCE.

CHAPTER 2.

MONEY OF ACCOUNT AND INTEREST.

3253. Rate of interest. 2077; 23 G. A., ch. 40. . . . . .

7. Money due, or to become due, where there is a contract to pay interest and no rate is stipulated. In all of the cases above contemplated parties may agree in writing for the payment of interest not exceeding eight cents on the hundred by the year.

[As amended so as to reduce the rate which may be contracted for to eight per cent.]

Parties may agree orally to pay a higher rate than six per cent., and where this is done and the amount afterwards ascertained and an obligation in writing given therefor, such obligation may be enforced between the parties, and if valid as to them no one else can complain: *First Nat. Bank v. Fenn*, 75-221.

And in such case the parol promise to pay is a sufficient consideration for the written obligation: *Ibid.*

Where a promissory note provided for interest "to be paid annually," with a further stipulation that "on failure to pay said interest when due the same shall become part of the principal and draw interest accordingly," *held*, that instalments of annual interest become due at the end of each year, and that the maker did not have the option either to pay annual instalments or to permit them to continue at the same rate of interest as the principal until the maturity of the note: *Carter v. Carter*, 76-474.

A party entitled to receive a portion of the proceeds of sales would doubtless be entitled to interest on the various sums from the time they came into the hands of defendant or his agents; but where such times are not shown, interest can only be allowed from the time of the commencement of the suit: *Hubenthal v. Kennedy*, 76-707.

Where a contract of sale provided for payment partly by cash on delivery and partly by note, with a stipulation that the balance (for which the note was to be given) should be payable in six months with interest at ten per per cent. after maturity, *held* that, no note having been given, plaintiff suing for balance of purchase price was entitled to interest from the end of the six months at the rate stipulated in the contract upon the portion which should have been paid in cash as well as upon the portion for which a note should have been given: *Bradley v. Palen*, 78-126.

In a controversy between a chattel mortgagee and creditors of the mortgagor claiming a mortgage to be invalid, *held* that, upon the allowance to the mortgagee of the amount of his claim, he was not entitled to recover interest subsequent to the date of the garnishment: *Southern White-Lead Co. v. Haas*, 76-432.

Where certain mortgages provided for interest, and payment was delayed by defendant's resistance to the claim, *held*, that interest was properly allowed: *Stickney v. Stickney*, 77-699.

3255. Illegal rate prohibited.

An instruction in regard to any scheme, artifice or device to conceal usury, and also that, if the note in question was made payable to plaintiff to enable the party who acted as plaintiff's agent to exact more than a legal rate of interest, it was usurious, *held* proper; and *held*, that the action of the agent without authority in taking a bonus in the name of his principal in excess of legal interest, where the principal accepts the benefit of the agency, will render the contract usurious. But *held* that, where the money borrowed from plaintiff was used in paying off an indebtedness to another, the existence of usury in the debt paid would not render the note to plaintiff usurious, even though the agent of plaintiff in the transaction knew of the usury in the debt paid: *Trimble v. Thorson*, 80-246.

Where the borrower believes that the person from whom money is obtained is the principal in the transaction, although he is in fact only the agent, the defense of usury may be interposed against the real principal to the same extent that it might have been interposed against the agent if he had been principal: *Glick v. Bramer*, 78-568.

Where a charge is made by the agent for his own benefit, in excess of the authorized rate of interest, the transaction is not tainted with usury, if the principal did not authorize the charge; and the fact that such charge is made by the agent will not give rise to the

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presumption of usury, but the burden rests on the borrower to show that the charge was authorized by the principal: *Greenfield v. Monaghan*, 52 N. W. R., 193.

Where the borrower knows that the person from whom he secures the money is acting as agent, and that he is exacting a commission for making the loan for him, such commission will not constitute usury: *Ammerman v. Ross*, 51 N. W. R., 6.

Where a party retained $21 out of a loan of $700, taking notes therefor bearing the highest rate of interest, *held*, that the contract was usurious: *Lombard v. Gregory*, 81–569.

Under the circumstances of a particular case, *held*, that it appeared that certain notes were given for usury, and recovery thereon was therefore denied: *Seekel v. Norman*, 78–254.

Under particular facts, *held*, that a note given for overdrafts in plaintiff's bank did not include usury: *First Nat. Bank v. Moore*, 48 N. W. R., 1072.

Where usury exacted by a national bank in violation of the federal statute is included in a note taken by such bank for overdrafts, the maker of the note cannot, by way of counterclaim, recover the penalty imposed by such statute, the action provided for being by separate suit to recover such penalty: *Ibid.*

A note is presumed payable at the place named as that of its execution; and if the rate of interest is not usurious at that place, the agreement will be deemed valid unless it shows that it was delivered elsewhere, and that it is intended by the transaction to avoid the usury laws: *Bigelow v. Burnham*, 49 N. W. R., 104.

3256. Usury; penalty.

If a judgment is confessed merely as a means of evading the usury law, notes given for such judgment are open to the defense of usury, but the burden of proving that the judgment was of a usurious character is upon the defendant: *Stoddard v. Lloyd*, 79–11.

Where it appears that the entire amount of the principal sum and more than enough interest to equal the forfeiture authorized by the statute has been paid, the court should not render judgment for a penalty in favor of the school fund: *Seekel v. Norman*, 78–254.

Where suit is brought on a usurious contract, the plaintiff is entitled to judgment for the principal without interest, and where payments have been made upon the contract, he will be entitled to judgment for the difference between the amount paid and the amount legally due: *Lombard v. Gregory*, 81–569.

And where payments have been made upon a usurious contract, in rendering judgment against the borrower in favor of the school fund, the amount upon which the interest should be computed should be ascertained by deducting the payments from the amount of the loans: *Ibid.*

The contract by a party who assumes the debt of another and himself becomes the debtor, to pay illegal interest, constitutes usury: *Heffner v. Brownell*, 82–104.

The fact that a contract is usurious should not be left to conjecture, and where it did not appear what amount of usury was paid, *held*, that the defense of usury would not be sustained: *Yetzer v. Applegate*, 50 N. W. R., 66.

The party pleading usury should establish his defense by a preponderance of the evidence: *Ammerman v. Ross*, 51 N. W. R., 6.

CHAPTER 3.

NOTES AND BILLS.

3260. Assignment.

The law will permit a person to assign what is his either in possession or by right of action, but it does not authorize him to transfer his obligations to a third party without the consent of his obligee: *Rappleye v. Racine Seeder Co.*, 79–220.

Therefore where defendants entered into a contract with Y. Bros., by which the latter were to buy a number of machines and pay for them when ordered, by giving their promissory notes, in consideration of which Y. Bros. were to have the exclusive sale of the machines in certain territory, and Y. Bros. proceeded to fulfill their contract by canvassing the territory assigned them, and selling a large number of machines, but before completing the contract became insolvent and made an assignment for the benefit of creditors, *held* that, without reference to the assignment for the benefit of creditors, the contract could not be assigned without the consent of defendant: *Ibid.*

Notice of assignment is not necessary to its validity: *Hirschl v. Clark*, 81–200.

Therefore, *held*, that where a certificate in a mutual benefit association authorized a change of beneficiary by the assured, notice of such change to the company was not necessary to its validity unless required by the contract of insurance, and that the execution of the instrument changing the beneficiary operated as an equitable assignment, although the certificate remained in the possession of the former beneficiary: *Ibid.*

3261. What negotiable.

There is nothing in this section to modify the rule requiring certainty as to the payee in order that the note may be negotiable: *Gordon v. Anderson*, 49 N. W. R., 87.

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3262. Rights of assignee.

The assignee of a cause of action is not entitled to recover anything which the assignor could not have recovered: *Callanan v. Windsor*, 78–193.

3271. Holidays. 2094; 18 G. A., ch. 31; 23 G. A., ch. 45. The first day of the week, called Sunday; the first day of January; the thirtieth day of May; the fourth day of July; the first Monday in September, to be known as "Labor Day;" the twenty-fifth day of December; and any day appointed or recommended by the governor of this state, or by the president of the United States, as a day of fasting or of thanksgiving, shall be regarded as holidays for all purposes relating to the presenting for payment or acceptance, and the protesting and giving notice of the dishonor of bills of exchange, bank checks, and promissory notes; and any bank or mercantile paper falling due on any of the days above named shall be considered as falling due on the preceding day.

[As amended by including labor day.]

CHAPTER 4.

TENDER.

3281. Effect of.

A tender admits liability to the amount of the sum tendered: *Taylor v. Chicago, St. P. & K. C. R. Co.*, 76–758.

Therefore, where plaintiff sued for injury to animals by defendant in the operation of its railroad, *held*, that a plea of tender by defendant admitted the ownership of the animals injured to be in plaintiff: *Scott v. Chicago, M. & St. P. R. Co.*, 78–199.

A tender has the effect of establishing the liability of the party making such tender, but it does not extinguish the indebtedness; and where an administrator made tender to a person entitled to a distributive share, of the amount assumed by him to be due such person, and subsequently without authority made a deposit of the same in a bank to such person's credit, where the money was lost by the bank's failure, *held*, that in an action against the administrator and his bondsmen the tender established the administrator's liability for the amount: *Rainwater v. Hummel*, 79–571.

A tender may be kept good if the party making it retains the money in his own possession: *Loughridge v. Iowa Life, etc., Ass'n*, 50 N. W. R., 568.

CHAPTER 5.

SURETIES.

3285. Release of.

Under this provision a creditor cannot hold the surety without instituting suit against the principal, or allowing the surety to do so, although the principal may have removed from the state: *Hayward v. Fullerton*, 75–871.

If a creditor makes a representation to a surety as to the condition of the indebtedness, or if he promises to look alone to the principal for payment, and the surety, relying upon such representation or promise, surrenders securities, or omits to procure security, or otherwise changes his position to award the principal, he is thereby discharged: *Auchampaugh v. Schmidt*, 77–13.

But where there was no misrepresentation as to existing facts, but merely a promise to look to the principal alone for payment, and it was shown that the relation of the surety to the principal remained unchanged, *held*, that the surety was not discharged: *Ibid.*

Where notice was given by the surety as here contemplated, and in pursuance thereof authority was given to the surety by the creditor to bring suit against the principal, but the suit brought under such authority was afterwards dismissed, *held*, that such proceeding did not deprive the creditor of the right to prosecute his claim before the assignee of the principal debtor, in an assignment for the benefit of creditors: *In re Assignment of Hobson*, 81–392.

These provisions have no application to cases where sureties are released by express act of the creditor: *Wolf v. Madden*, 82–114.

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CHAPTER 6.

PRIVATE SEALS.

3289. Abolished.

A corporation may make a valid written contract without the use of a seal: *Muscatine Water Works Co. v. Muscatine Lumber Co.*, 52 N. W. R., 108.

A mortgage not being now an instrument under seal, parol evidence is admissible to show whether an executor is bound thereby individually or in his representative capacity: *Ames v. Holderbaum*, 44 Fed. R., 224.

3290. Consideration implied.

A deed implies a consideration unless there is evidence to the contrary: *Brockway v. Harrington*, 82–23.

While a written instrument imports a consideration, yet a receipt stipulating that on payment of a portion of the indebtedness the debtor is released from the balance does not give rise to the presumption of a consideration in opposition to its own terms in such sense as to be valid: *Bender v. Been*, 78–283.

Where a sheriff levied upon certain property under an execution in favor of A. and against B., and P. claimed to own said property and entered into a contract with A. by which he agreed to hold the property subject to the levy, the rights of A. and of the sheriff being in no wise prejudiced, *held*, that the contract being in writing imported a consideration: *Allen v. Pratt*, 79–113.

In a suit upon certain drafts, *held*, that they imported a consideration, and it was unnecessary for plaintiff to either plead or prove it in the first instance, and the averments in the answer as to want of consideration were denied by operation of law without a reply, and that it was competent for plaintiff to show that the drafts were given in settlement of a disputed claim: *Gafford v. American Mortgage & Investment Co.*, 77–736.

In an action upon a promissory note where the signature is established, the burden of proof is upon the defendant to show that the note was without consideration, where that is the defense upon which defendant relies: *McCormick v. Jacobson*, 77–582.

3291. Fraud; innocent purchaser; recovery.

Under this section as amended, the purchaser of a note procured by fraud, although he has purchased for value before due, without notice, is not entitled to recover a greater sum than that paid for the note, with interest and costs, and it is proper, therefore, to introduce evidence to show the amount paid in such cases, and that question can properly be submitted to the jury in the absence of evidence of notice of fraud: *Richardson v. Monroe*, 52 N. W. R., 839.

CHAPTER 7.

ASSIGNMENTS FOR CREDITORS.

3292. Must be general.

What void: A trust deed executed in another state, making disposition of property in trust for the benefit of creditors, *held* to be an assignment for the benefit of creditors within the meaning of the statute: *Schee v. La Grange*, 78–101.

An assignment for the benefit of creditors where preferences are given is invalid because it is fraudulent; and it is the fraud which vitiates the transaction; and in a particular case, where the court found that certain mortgages were in effect a general assignment, but not for the benefit of creditors, *held*, that it was merely a finding of fraud: *Wise v. Wilds*, 77–586; *Arnold v. Wilds*, 77–593.

Where a general assignment is made, and as a part of the same transaction, and for the purpose of giving a preference, a mortgage is executed by the same party, the assignment and mortgage will both be void: *Rock Island Plow Co. v. Breese*, 49 N. W. R., 1026.

But where the mortgage was made pending the execution of the assignment, for the purpose of preventing the levy of an attachment, which would have defeated the making of an assignment, *held*, that such mortgage did not render the assignment void: *Ibid.*

Where the assignment on its face purports to be an assignment for the benefit of all the creditors, the mere designation of persons as creditors in the schedule who may not have valid claims does not render the assignment void: *Hamilton-Brown Shoe Co. v. Mercer*, 51 N. W. R., 415.

It is not questioned, however, but that a creditor may disregard and treat it as void and proceed to attach the property, if it is made for a fraudulent purpose or is for the

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benefit of only a portion of the creditors: *Ibid.*

The fact that the assignment does not cover property exempt from execution does not render it invalid: *Bradley v. Bischel*, 81–80.

Also *held*, that the fact that the assignment, being of partnership property, specified only the payment of partnership debts without provision for application of a residue to payment of individual debts, would not render the assignment invalid, as the law would, without any special provisions, make such application: *Ibid.*

The fact that the assignor supposes that he will escape further liability for his debts by making such assignment will not render the assignment void: *Ibid.*

The fact that some of the creditors are attempting to defraud the others under the assignment will not render the assignment void, the remedy being on application to the proper court to prevent such fraud: *Ibid.*

By partners: Where a conveyance was made by a firm covering their entire property with full power of disposition and conversion by the trustee, and for the benefit of creditors, and providing for benefit of certain creditors, *held*, that such conveyance constituted an assignment and was not changed in its effect by chattel mortgages executed the next day in pursuance of the same general plan for preferring the creditors named in the conveyance, and that as such conveyance was invalid as to creditors, it did not prevent attachment of the property by the creditor to whom the second chattel mortgage was given, such mortgage being entirely ineffectual: *King v. Gustafson*, 80-207.

One partner has no power to execute a general assignment of the firm property without the assent, express or implied, of the copartner: *Osborne v. Barge*, 35 Fed. R., 92.

Partial assignment: This statute in no manner affects the common-law right of an insolvent to make a partial assignment for the benefit of creditors: *Loomis v. Stewart*, 75–387.

A debtor may make a partial assignment for the benefit of any or all his creditors, and the provisions of the statute with reference to a general assignment do not apply to such a case: *Buck v. Chase*, 52 N. W. R., 196.

The statutory provisions relate to general assignments, not to partial assignments: *Bock v. Perkins*, 139 U. S., 628.

A mortgage given by a debtor upon all his property not for the benefit of all his creditors, and reserving a right of redemption, will not be deemed invalid: *Younkin v. Collier*, 47 Fed. R., 571.

An insolvent debtor may lawfully mortgage all his property for the security of a portion of his debts, even though nothing is left for the payment of those unsecured: *Rollins v. Shaver Wagon, etc., Co.*, 80–380.

The fact, that some of the claims for which a mortgage was given are fraudulent will not invalidate the instrument: *Ibid.*

The fact that the debtor executes a mortgage to one creditor and immediately after makes a general assignment does not necessarily invalidate the latter. It must appear that the debtor at the time of giving the mortgage had the intention of disposing of his property for the benefit of his creditors, and with that intention gave the mortgage to secure one or more of his creditors, completing a transfer of his property by the execution of the deed of assignment: *Farwell v. Maxwell*, 34 Fed. R., 727.

This section does not prohibit partial assignments, and while several instruments executed about the same time may under some circumstances be construed together as a general assignment, they are not necessarily so construed, the question depending upon the character of the instruments, the circumstances of the case and the intent of the parties: *South Branch Lumber Co. v. Ott*, 142 U. S., 622.

If the debtor in giving security to part of his creditors does so without intending to make a general assignment for the benefit of all of them, the transaction is valid even though within a brief time thereafter, and on the same day, he forms and executes the purpose of making such assignment: *Clement v. Johnson*, 52 N. W. R., 502.

The transfer of all property in the payment of a pre-existing debt is not fraudulent, even though the transferee may have knowledge of other creditors and of the insolvency of the debtor: *Butler v. Diddy*, 49 N. W. R., 995.

The execution of mortgages by an insolvent debtor with the *bona fide* intention of securing particular creditors does not operate as a general assignment: *Ibid.*

The intention on the part of the debtor to transfer all of his property to one creditor to the exclusion of other creditors, and the knowledge to that effect of the creditor, will not render such transfer invalid. Such transaction does not constitute a general assignment: *Stewart v. Mills County Nat. Bank*, 76–571.

The fact that the creditor to whom property is thus transferred displays great haste in getting the conveyance on record for the purpose of maintaining priority over other creditors will not show fraud such as to render the transaction invalid: *Ibid.*

Intention: In determining whether a disposition of property constitutes such a general assignment as to be void, because not made for the benefit of all creditors, the intention of the parties will control: *Letts-Fletcher Co. v. McMaster*, 49 N. W. R., 1035.

Where the assignment is made to a creditor and secures to him a less proportion of the property than he would be entitled to under a general distribution, it cannot be said to be void as giving preferences: *Cleveland, etc., Stove Co. v. Wilson*, 80–697.

The law does not defeat an assignment because it does not cover all the assignee's property. Whatever is not assigned may be pursued by the creditors, but the assignee cannot be made liable as garnishee for property never coming into his hands: *Ibid.*

Where a debtor executed a deed of assignment of his personal property for the benefit of creditors, and a short time before had conveyed his real estate in payment of a debt, *held*, that an instruction to the jury that if the deed was executed according to a definite, prior agreement, in such sense as to be a distinct transaction from that of the assignment, and independent of it, the assignment was valid, was not objectionable in that it failed

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to instruct the jury as to the essentials of a valid contract, as the question was whether the act was so connected in point of time and intention with the execution of the other instrument as to form a part of that transaction and with it constitute a general assignment, which was to be determined from the circumstances surrounding the execution of the instruments and the motives and intentions of the debtor in executing them: *Loomis v. Stewart*, 75–387.

The fact that an assignor has withheld certain of his personal property and appropriated it to the payment of his debt to a particular creditor will not invalidate the assignment, as the assignee can yet recover the property, and evidence of such facts is properly excluded, when the question to be determined is the validity of the assignment: *Ibid.*

Real estate: Where the assignment did not, in terms, refer to real estate, but was evidently designed to be a general assignment for the benefit of creditors under the statute, it will be presumed until the contrary appears that it was designed to include all the property subject to the assignment that the assignor then owned: *Loomis v. Griffin*, 78–482.

Conditions: An assignment for benefit of creditors containing a provision requiring the creditors to accept a *pro rata* share of the proceeds of the property in full satisfaction of their claims is not unconditional, and is, therefore, void upon its face: *Sperry v. Gallaher*, 77–107.

Rescission of contract: Where a contract of sale is made for property to be delivered on credit, the same to be paid for by notes of the purchaser, who becomes insolvent before delivery, and makes an assignment for the benefit of creditors, the seller has a right to rescind the contract, even though the assignee may be both able and willing to fully execute it: *Rappleye v. Racine Seeder Co.*, 79–220.

Insolvency: The question as to what constitutes insolvency discussed under the statute making it criminal for a bank to receive deposits while insolvent; and *held*, that in such case a bank might be deemed insolvent whose affairs are so situated that it cannot meet its demands in the usual course of business: *State v. Cadwell*, 79–482.

3294. Effect.

The assignee is to represent the creditors, and it is his duty to devote the assets of the assignor to the payment of his debts, but his claims are no higher than the rights of the creditors themselves: *Davenport Plow Co. v. Lamp*, 80–722.

And *held*, that where the treasurer of a corporation had, without authority, loaned the funds of such corporation to another corporation, which afterwards made an assignment for the benefit of creditors, the former corporation had the right to trace the funds into the hands of the assignee, and to reimbursement thereof in preference to the claims of general creditors: *Ibid.*

3295. Acceptance.

Where an assignee had agreed orally to accept an assignment for the benefit of creditors, before the assignment was executed, and after the assignment was filed for record an attachment was levied on the property, *held*, that the acceptance was sufficient to make the assignment take effect before the levying of the attachment: *Singer v. Armstrong*, 77–397.

And evidence of the oral acceptance being admissible, there was no error in admitting the assignment itself in evidence: *Ibid.*

3296. Notice; filing within three months.

Notice by mail to a creditor is not necessary to make it obligatory upon him to file his claim, within the provisions of § 3305: *Carter v. Lee*, 82–26.

A party invoking the aid of the statute is entitled to relief only according to its provisions, and if his claim is not filed within three months he is not entitled to payment until the claims which have been filed within that time are settled. He cannot insist that the assignment is invalid and at the same time claim to share *pro rata* with the creditors whose demands were filed in time: *Loomis v. Griffin*, 78–482.

Where a claim filed after the period of limitation was but a mere restatement on the basis of a former claim filed within due time, *held*, that it was entitled to be considered: *In re Assignment of Rea*, 82–231.

3297. List of creditors.

Where the wife was surety on an obligation of the husband, *held*, that she was as to such contingent liability a creditor within the meaning of this section, and entitled to compel the satisfaction of the obligation by the assignee of her husband: *In re Assignment of Rea*, 82–231.

Where plaintiff delivered a letter of credit to a bank for collection, and the bank made an assignment for the benefit of creditors, after the same was collected, but before it had been paid over to plaintiff, *held*, that plaintiff by filing his claim with the assignee did not thereby waive his right to payment of the full amount of the claim: *Nurse v. Satterlee*, 81–491.

3298. Objection to claims; allowance.

A creditor having under this section ample protection against the application of the property to the payment of unauthorized claims cannot treat the assignment as void on the ground that in the list of creditors are included persons who have no valid claim

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against the estate, and attach the property: *Hamilton-Brown Shoe Co. v. Mercer*, 51 N. W. R., 415.

Whether, in view of the powers conferred by this section, a motion can properly be sustained transferring equitable issues to the equity side of the docket, *quære: In re Assignment of Hobson*, 81-392.

The rule that a person cannot claim property under two inconsistent rights at the same time, or pursue different and inconsistent remedies, does not prevent a creditor who has given the surety authority to sue the principal in pursuance of the notice contemplated by § 3285, from also prosecuting his claim before the assignee, the action by the surety having been subsequently dismissed: *Ibid.*

Where a claim was allowed against an estate of an insolvent debtor and his assignee, and the wording of the judgment was as follows: "that such be and is hereby established as a claim against the estate of Young Bros. and against the said Rappleye as their assignee," *held*, that the judgment did not establish a personal claim against the assignee and would only be subject to *pro rata* payment like the other claims: *Rappleye v. Racine Seeder Co.*, 79-220.

3299. Dividends.

The court may direct the assignee as to the payments he should make, and the order in which they should be made, without a formal application by either party: *In re Assignment of Hooker*, 75-377.

3302. Settlement.

The assignee being an officer of the court in the management and disposal of the property, a creditor claiming that the assignment is fraudulent should attack it in the assignment proceedings, and cannot levy an attachment upon the property in an action against the assignor: *Hamilton-Brown Shoe Co. v. Mercer*, 51 N. W. R., 415.

Where the assignment is regularly made, and the assignee is in possession of the property for the settlement of the estate, such property is in the custody of the law, but this might not be so if the assignment were invalid or void: *Ibid.*

3305. Claims filed after three months.

The provisions of this section are not limited to creditors who have received notice by mail of the making of an assignment as provided for in § 3296: *Carter v. Lee*, 82-26.

Where the members of a partnership joined in an assignment of their partnership and individual property for the benefit of partnership and individual creditors, *held*, that claims filed within the statutory time by creditors of the partnership took precedence over a claim filed by an individual creditor of one of the partners after the expiration of three months, although the individual property of such member was more than sufficient to pay his individual debts, claims against the partnership being also claims against the individual members: *Budd v. King*, 48 N. W. R., 975.

3306. Sale of property.

Where the assignee sold real property of the assignor to a person who held a mortgage for purchase-money thereon for the amount of such mortgage, which was satisfied, and such purchaser subsequently conveyed the land to one of the partners in the partnership making the assignment, *held*, that the transaction was valid and that the creditors could not attach such property, it appearing that the land was not worth more than the amount of the mortgage which was released as a consideration of its transfer: *Lynch v. Simmons Hardware Co.*, 80-503.

CHAPTER 8.

MECHANICS' LIENS.

3311. Who may have lien.

It is not necessary to support a lien that the contract be made before the material is furnished. A promise to pay for the material after a portion of it is furnished will have relation to the act of furnishing it and will bind the owner as though it were done then. If the owner intends to pay for the material and appropriates it to his own use, the law will imply a contract binding him to pay for it: *Carney v. Cook*, 80-747.

To entitle a party to a mechanic's lien it is essential that there should be a contract with the owner. And where it appeared that the person claiming the mechanic's lien was the owner of the land at the time the claimed contract was made, *held*, that he was entitled to no lien, although he held title to the land as trustee, with the purpose of conveying it to a corporation which should subsequently be formed, it not appearing that the parties who

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became beneficially interested in such corporation ever owned a legal or equitable title to the property: *Littleton Sav. Bank v. Osceola Land Co.*, 76–660.

The owner is not of necessity the one who has the legal or equitable title, but may be one for whose immediate use and benefit the improvement is made. So *held* where the person for whom the improvement was made had a power of attorney from the real owner to buy and sell, execute mortgages on the land, occupy it himself, and hold the same in all respects as if he were the absolute owner, the deed in such case not having been recorded, and the person furnishing the material having no knowledge of the condition of the title: *Knapp v. Greenwood*, 48 N. W. R., 1055.

Where a purchaser of land under a bond for a deed which stipulated that the seller might declare the contract forfeited on failure of the buyer to make payments, and that the buyer should until payments were made be deemed a tenant, procured material from plaintiff for the erection of improvements, *held*, that the making of improvements being evidently contemplated by the parties, the person furnishing material was entitled to a lien on the improvements made, notwithstanding the forfeiture declared by the vendor for failure of the purchaser to make the payments, the improvements consisting of a building erected upon blocks: *Oliver v. Davis*, 81–287.

Where a chattel mortgage on brick appeared to be a mere floating mortgage to cover brick on hand, and not precluding sales by mortgagor, *held*, that the holder of such mortgage was not entitled to a mechanic's lien for bricks furnished by mortgagor for a building on premises of mortgagor's wife: *Meredith v. Kunze*, 78–111.

Where it appeared that lightning rods were put upon the wife's premises under a contract with the husband, and that she was consulted in regard to the improvement and agreed thereto and saw the rods put up without objection, *held*, that the mechanic's lien might properly be enforced against her premises: *Frank v. Hollands*, 81–164.

Where a wife owns land and her husband erects a dwelling-house thereon, the establishment of a mechanic's lien on the building is not inconsistent with the wife's ownership of the land: *Estabrook v. Riley*, 81–479.

Where one person owns land and another has such an interest in it that he may erect a building thereon for his own use and benefit, the beneficiary is the "owner" under the provisions of this section: *Ibid.*

3312. Extent of lien.

As to lien on improvements in case of forfeiture of contract of sale for failure of vendee to perform, see notes to last section.

3314. Filing statement.

Where the statement shows the essential facts the lien will not be defeated by want of technical accuracy as to the time when the labor was performed or the material furnished: *Bangs v. Berg*, 82–350.

Unnecessary matter in the statement or petition will not defeat the lien: *Ibid.*

In an action to foreclose a mechanic's lien against a landlord and tenant, where there was a mistake in the description of the land in the claim filed for the lien, *held*, that the error would not defeat the lien against the landlord, as it appeared that he had actual knowledge of the improvements and that plaintiff claimed a lien on them: *National Lumber Co. v. Bowman*, 77–706.

Where the last item of an account for material furnished for the construction of a house consisted of one blind, which was afterwards returned, *held*, that if the blind was furnished in good faith it properly constituted an item from the date of which the time for filing a mechanic's lien should be reckoned: *Hug v. Hintrager*, 80–239.

A statement of an account for materials used in the construction of a building, which describes such materials in language peculiar to the trade, is a sufficient compliance with the requirement that a statement of a claim for a mechanic's lien shall be accompanied by an account of items forming the basis of the claim: *Wetmore v. Marsh*, 81–677.

It is required that the statement shall be verified by affidavit, but it is not provided that such affidavit shall be by the claimant for the lien. and where such affidavit was made by an employee of the firm, having authority to make contracts for them and having personal knowledge of the transaction, *held* sufficient: *Hug v. Hintrager*, 80–359.

Where a statement of an account was filed with the clerk with a claim for a mechanic's lien, and the jurat of the affidavit was signed, "L. A. Wilkinson, Clerk," *held*, that the signature of the clerk was sufficient, as it would be understood that he was the clerk of the court in which the action was pending: *Wetmore v. Marsh*, 81–677.

3315. Notice by subcontractor.

Where a contractor has received payment in full before an agreement is made with a subcontractor for materials, the subcontractor can have no lien against the owner of the property: *Mallory v. Marion Water Works Co.*, 77–715.

Where a contractor has been paid without knowledge of any claims for liens by subcontractors, such payment relieves the owner from any further liability: *Parker v. Scott*, 82–266.

The subcontractor, to be entitled to a lien, should show such indebtedness on the part of the owner to the contractor, either at the time the subcontractor's account commenced, or later, as will justify a court in decreeing a lien: *Ibid.*

Although the claim of the subcontractor is

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not filed and notice given within thirty days from the completion of the work, yet if, at the time a statement is filed and notice given, there is money due or to become due from the owner to the principal contractor, the lien will attach to the amount due or to become due to the contractor not to exceed the amount due to the subcontractor: *Hug v. Hintrager*, 80–359.

Where the subcontractor has filed his statement and given notice thereof within thirty days, the owner makes payment to the principal contractor at his own risk and subject to the right of the subcontractor to assert his lien: *Ibid.*

Where the owner knew that material was being furnished by a subcontractor, *held*, that the claim therefor was a lien, although the owner, assuming that the material was to be furnished by the contractor personally, had made payment in full: *Ibid.*

Where material is furnished which the owner promises to pay for, the person furnishing the material is entitled to a lien without regard to the provisions with reference to subcontractors: *Carney v. Cook*, 80–747.

3317. Priority.

The liens take priority in the order of their filing: *Robertson v. Barrack*, 80–538.

A mechanic's lien for materials furnished for improvements on leased premises is superior to the landlord's lien for rent and to a chattel mortgage taken by the landlord on the improvements, before the proceeding for the establishment of the mechanic's lien is commenced: *National Lumber Co. v. Bowman*, 77–706.

Where materials were furnished for the construction of a building on mortgaged premises, *held*, that the person furnishing such material had a prior lien on the building as against a mortgagee of the land, and upon foreclosure of the mechanic's lien, as between the holder of such lien and the owner, the building might be treated as personal property and sold separately without right of redemption, and the mortgagee allowed a reasonable time in which to redeem the building before removal: *Luce v. Curtis*, 77–347.

Under peculiar facts, *held*, that a contract to convey, being prior to the filing of a statement for a lien, took priority over such lien: *Frost v. Clark*, 82–298.

3318. Definition of "owner."

See notes to § 3311.

3329a. Miners' liens. 23 G. A., ch. 47. Every laborer or miner who shall perform labor in opening and developing any coal mine, including sinking shafts, constructing slopes, or drifts, mining coal and the like, shall have a lien upon all the property of the person, firm or corporation, owning, constructing or operating such mine, used in the construction or operation thereof, including real estate, buildings, engines, cars, mules, scales and all other personal property, for the value of such labor for the full amount thereof, upon the same terms with the same rights and to be secured and enforced as mechanics' liens are secured and enforced.

[As to preferred claims for wages in case of levy of attachment or execution, see 23 G. A., ch. 48, *infra*, § 4307a.]

CHAPTER 10.

WAREHOUSEMEN, CARRIERS, KEEPERS OF STOCK, AND INNKEEPERS.

3363a. Packing-house certificates. 24 G. A., ch. 44, § 1. Any corporation or person engaged in the business of slaughtering cattle, sheep or hogs and who own or control the building or buildings wherein such business is conducted and the manufactured products therein stored, may execute and issue certificates, or warehouse receipts, for any such manufactured product that may actually be in said building or buildings, or for any part or quantity thereof, and may thereby sell, convey, assign, transfer, pledge or incumber said product, or any part or quantity thereof. But such certificate, or warehouse receipt, shall contain the name and address of the party issuing it, and to whom issued, the location and description of the premises, warehouse, or building, or other place where the product is stored, the date of issuance, and the quantity of product and its kind, and the brands or distinguishing marks upon such property, and shall be signed by the person issuing it and if issued

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by a corporation, by its secretary and manager; and certificates and receipts issued in the manner and form aforesaid, shall operate and have the effect to transfer the title to the product described in them, and vest the same in the holder thereof, in accordance with the terms therein expressed, and the holders thereof may sell, assign, transfer, or otherwise dispose of the same in like manner, without the purchaser, pledgee, assignee or holder being required to have the same recorded, or give notice to protect himself against existing or subsequent incumbrancers or purchasers, as required in other cases where property is left in the possession of the vendor or pledgor.

3363b. Books kept. 24 G. A., ch. 44, § 2. Every corporation or person making and issuing certificates or receipts for meat products as herein contemplated, shall keep a regular, well-bound book, wherein shall be kept and entered, at the date of the issuance thereof, a full account of each and every certificate or receipt, with the date of issuance, number, name of person to whom issued, the quantity and kind of meat product and the brands or distinguishing marks denoting such property covered by such certificates or receipt; and, when such product shall have been delivered under the certificate or receipt, or the said paper is otherwise canceled or becomes void, the date of such cessation of liability shall be entered in connection therewith; and such books and the building where such product is stored shall be subject to the inspection and examination of each and every person holding any such certificate or receipt, his agent or attorney. Any person wrongfully altering, changing, or wilfully destroying any such book, shall, upon conviction, be fined not exceeding ten thousand dollars, or imprisonment in the county jail not exceeding one year, and any person issuing any receipt or certificate, without entering and preserving in such book the required memorandum, shall be fined, upon conviction, not to exceed one thousand dollars for each certificate or receipt so issued, and be liable for all damages sustained in consequence of such omission.

3363c. Penalty for false certificates. 24 G. A., ch. 44, § 3. Any person who shall knowingly issue any such certificate or receipt for meat product, when the product described therein is not actually in the building or buildings or other place mentioned therein, or shall knowingly, with intent to defraud, issue a second certificate for meat product, for which, or any part of which, any former certificate or certificates, receipt or receipts are outstanding, uncanceled, valid and subsisting, shall, besides being liable for all damages caused by such second issue, be guilty of felony, and for each offense be fined not to exceed ten thousand dollars, and imprisonment in the penitentiary not exceeding five years.

3363d. Evidence. 24 G. A., ch. 44, § 4. All certificates and receipts, issued under the provisions of this act, shall be, in the hands of the holder thereof, presumptive evidence of title to said property both in law and equity.

3363e. Incumbrance or removal prohibited. 24 G. A., ch. 44, § 5. No corporation or person issuing such certificates or receipts, shall sell or incumber, ship, transfer, or in any manner remove beyond its or his immediate control in the building where stored, any of such meat product for which such certificate or receipt has been given as aforesaid, without the written consent of the person holding the same, while such certificate or receipt remains in force, and any corporation or person violating any provision of this section shall be guilty of a felony, and for each offense be fined not to exceed ten thousand dollars, and imprisoned in the penitentiary not exceeding five years.

3363f. Action; damages. 24 G. A., ch. 44, § 6. Every person aggrieved by the violation of the provisions of this act, may have and maintain an action at law against the person violating the same before any court of competent

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jurisdiction, and shall not only recover actual damages, but exemplary damages, whether such person shall have been convicted under a criminal charge for the same act or not.

3371. Carrier cannot limit liability.

See notes to § 2007.

3372. Lien of livery-stable keepers.

Whether a party whose business is breaking and training horses can have a lien for his services, within the provisions of this statute, *quære*. But under the facts, *held*, that if any such lien existed it was abandoned: *Bray v. Wise*, 82-531.

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TITLE XV.

THE DOMESTIC RELATIONS.

CHAPTER 1.

MARRIAGE.

3380. Proof of age.

A false writing delivered to the clerk, purporting to communicate the consent of a parent to the marriage of his daughter, but stating that she was of age, *held* not to constitute the crime of uttering a forged instrument under § 5224: *State v. Rhine*, 50 N. W. R., 676.

3388. Proof of marriage.

The evidence of marriage in a particular case *held* sufficient: *Gilman v. Sheets*, 78–499.

CHAPTER 2.

HUSBAND AND WIFE.

3394. Interest of either in other's property.

Conveyances between husband and wife intended to cut off the interests of either in specified portions of the estate of the other, thus making a division between them, are void, and convey no title or interest to the respective parties: *Shane v. McNeill*, 76–459.

And in such case, *held*, that the fact that the wife took possession of real property conveyed to her under such arrangement and retained possession thereof, after the death of her husband, did not constitute a ratification such as to render binding upon her the agreement to release her dower in the property of the husband: *Ibid.*

The husband and wife may contract with each other with reference to division of the property on the dissolution of the marriage relation by divorce, provided the contract is reasonable, fair and just: *Nieukirk v. Nieukirk*, 51 N. W. R., 10.

3397. Conveyances to and contracts with each other.

Transactions between husband and wife to the prejudice of creditors are to be scanned closely, and their *bona fides* must be clearly established, and where a husband by borrowing money and carrying on business in his wife's name sought to exempt from his own debts the proceeds of his personal industry, skill and judgment in carrying on the business of furnishing board for railroad construction hands, *held*, that the proceeds of such business were not exempt from liability: *Hamill v. Augustine*, 81–302.

The wife may acquire title to exempt property from her insolvent husband without the payment of a consideration, and she may acquire title from him to property that is not exempt, by paying its full value, in good faith: *Gollsbitsch v. Ranibon*, 51 N. W. R., 48.

Where a wife takes title to property through an exchange in lieu of her interest in other property owned by herself and husband jointly, she will be protected therein as against the husband's creditors, if it appears that the transaction was in good faith and not for the purpose of defrauding such creditors: *Deering v. Lawrence*, 79–610.

Where it appeared that a transaction between husband and wife was part of a plan to allow the wife to profit by a claim which was without merit, *held*, that such claim of the wife should be disregarded: *Shaver Wagon & Carriage Co. v. Halsted*, 78–730.

Where a wife sought to foreclose a chattel mortgage, and the defendant and certain intervenors claimed that the note and mortgage did not belong to the plaintiff but to her husband, *held*, that the evidence was insufficient to establish that the note was the property of the plaintiff, but to the extent of the money she claimed to have contributed to the purchase of the note it belonged to her husband: *Gardner v. Connelly*, 75–205.

Under the circumstances of a particular case, *held*, that money claimed by the wife as her separate property was not shown to be such, and that she could not therefore hold it

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exempt from her husband's debts: *Estey v. Fuller Implement Co.*, 82–678.

Where a husband conveyed property to his wife in consideration of future support and because he was growing old, *held*, that such conveyance was invalid as to existing creditors: *Shaw v. Manchester*, 50 N. W. R., 985.

Where a note is given by the husband, who is insolvent, to the wife, in order to lay the foundation for a claim to the husband's property, in view of legal embarrassment, a deed made in consideration of the amount due on such note will not be valid as against the creditors: *Jons v. Campbell*, 51 N. W. R., 87.

Under particular circumstances, *held*, that a mortgage by a husband to a wife, securing a note executed by him for a previous indebtedness, was not without consideration, nor fraudulent: *Meyer v. Houck*, 52 N. W. R., 235.

Under particular circumstances, *held*, that there was sufficient consideration to support a conveyance from a husband to a wife, and that it was not executed for the purpose of defrauding creditors, even though the wife had knowledge of her husband's obligations at the time of such conveyance: *Davis v. Garrison*, 52 N. W. R., 359.

A voluntary transfer of property in contemplation and under promise of marriage is fraudulent, and may be set aside in an action by the wife after marriage: *Beere v. Beere*, 79–555.

In a particular case, *held*, that a conveyance made by a man who anticipated the probability of being compelled to marry a woman to avoid a prosecution for seduction was fraudulent, and might be set aside in an action by his wife by such marriage, although it was made to his mother, to whom he was indebted, and was claimed to have been in payment of such indebtedness, it appearing, however, that the indebtedness was not the primary cause inducing the making of the conveyance nor its acceptance: *Ibid.*

A contract between the husband and wife, by which the husband, in consideration of the faithful performance by the wife of the obligations incident to the marriage relation, agrees to pay the wife sums of money at stated intervals, is against public policy and without consideration, and suit cannot be maintained thereon by the wife to compel payment of the sums stipulated: *Miller v. Miller*, 78–177.

The terms of an ante-nuptial contract considered, as to whether the provisions made for the wife were in lieu both of dower and of her distributive interest in personalty: *Ditson v. Ditson*, 52 N. W. R., 203.

Where a husband rendered services to his wife in connection with her property, *held*, that it might properly be found that he was her agent in its management: *Johnson v. Grimminger*, 48 N. W. R., 1052.

3402. Wife's earnings.

Where a wife kept boarders and accumulated money which she loaned to her husband, and he afterwards repaid it, by furnishing money which the wife invested in real estate, *held*, that her title to the property could not be attacked on the ground that it had been conveyed to her in fraud of creditors of her husband: *Gilbert v. Glenny*, 75–513.

The keeping of boarders by a married woman is such business, independent of her duties as a wife, as authorizes her to hold the proceeds of her employment as her own: *Ibid.*

Section 2499 of the Revision, providing that, when a wife allows her husband to use her personal property, she must place notice of her ownership on record in order to avoid surrendering her interest to her husband's creditors, has no application in the case of creditors who became such after the repeal of that statute by the enactment of the Code of 1873: *Ibid.*

3403. Liability of property of one for debts of the other.

Where a wife let her husband have money while the Revision was in force, but failed to file in the proper office a notice of her claim as required by § 2500 of the Revision, parties who became creditors of the husband after the repeal could not object to a mortgage given by him to his wife, after such repeal, to secure the money and interest: *First Nat. Bank v. Fenn*, 75–221.

And see notes to § 3397.

As to liability of husband for wife's attorney fees in divorce suit, see notes to § 3420.

3405. Family expenses.

It is error to limit the liability under this section with reference to medical services to such as are necessary and proper. The averment in the petition that the expenditure sued for was a necessary family expense will not oblige the plaintiff to prove that the expense was necessary: *Schrader v. Hoover*, 80–243.

While the property of the wife may be liable for rent of premises leased to the husband as a dwelling for the family, it cannot be seized under landlord's attachment by virtue of such lease for rent not yet accrued: *Schurz v. McMenamy*, 82–432.

The wife is not liable under this section for the rent of a farm leased by the husband for farming purposes, although a house located thereon is occupied by the family, and the supplies of the family are drawn to some extent from the produce and crops of said farm: *Hecht v. Gilch*, 82–596.

Where the plaintiff sought to recover from the husband items of family expense under a contract made with the wife, since deceased, *held*, that the plaintiff could not testify with reference to such contract: *Galvin v. Bischoff*, 80–605.

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CHAPTER 3.

DIVORCE, ANNULLING MARRIAGES, AND ALIMONY.

3411. Jurisdiction.

Under particular facts, *held*, that a supplementary decree of a court of another state, fixing the amount of alimony to be paid under a decree of divorce previously rendered in that state, was with jurisdiction, and would be recognized in this state: *Alderson v. Alderson*, 50 N. W. R., 671.

3413. Evidence.

In an action for divorce on the ground of cruel and inhuman treatment endangering life, *held*, that the facts established by the only corroborating witness in connection with the testimony of plaintiff were not such as to entitle her to a divorce: *Potter v. Potter*, 75–211.

In an action by a wife for divorce upon the ground of the habitual drunkenness of her husband, where there was no direct corroboration of the evidence of the wife that defendant had acquired the habit of drunkenness after marriage, but the evidence of other witnesses was such as to show that the fits of intoxication became more frequent in later years, and that towards the last he was in a continuous state of intoxication, *held*, that this was a sufficient corroboration of plaintiff's testimony: *Lewis v. Lewis*, 75–200.

3414. Grounds for divorce.

Inhuman treatment: A long continued course of ill treatment, even without physical violence, may be such as to endanger the life of a wife who is subjected thereto: *Doolittle v. Doolittle*, 78–691.

The habitual use of vile epithets by the husband towards the wife, accompanied with threats of physical violence and occasional acts of violence, *held* sufficient under the circumstances to entitle the wife to a divorce: *Douglass v. Douglass*, 81–258.

In a particular case, *held*, that insulting and abusive language, and acts of violence, were not sufficient to warrant a decree of divorce on the ground of cruel treatment: *Potter v. Potter*, 75–211.

In an action for divorce on the ground of inhuman treatment endangering life, in a particular case, *held*, that the evidence failed to show that the conduct complained of by plaintiff had any serious or permanent effect upon her health and a divorce was properly denied: *McKee v. McKee*, 77–464.

In a particular case, *held*, that the evidence did not show such cruel and inhuman treatment as to entitle the wife to a divorce: *Gilbertson v. Gilbertson*, 78–755.

In an action for divorce upon the ground of inhuman treatment, where the testimony showed frequent contentions and disputes for which both were to blame, but failed to sustain the charge of inhuman treatment, *held*, that a divorce was properly denied: *Edgerton v. Edgerton*, 79–68.

In a particular case, *held*, that while the husband had been coarse and brutal, yet the wife had shown such lack of regard for his feelings that the court could not consider her nature so sensitive to harsh and even obscene language that her life had been put in danger by hearing it: *Evans v. Evans*, 82–462.

Proof that the husband at the time of the inhuman treatment complained of was insane will defeat divorce on that ground: *Tiffany v. Tiffany*, 50 N. W. R., 554.

Desertion: Where there is desertion of the husband by the wife on account of inhuman treatment which in itself is a ground for divorce, such desertion cannot be made a basis of divorce by the husband: *Doolittle v. Doolittle*, 78–691.

The law requires a husband to do all he reasonably can to protect his wife from insult and abuse, and failing to do so, she is, in a proper case, justified in leaving him, and such leaving will not constitute legal desertion. So *held*, where the insult and abuse were from children of the husband by a former marriage: *Day v. Day*, 50 N. W. R., 979.

Also *held*, in such case of desertion, if the husband desired to give the wife an opportunity to return to him, his offer should not only be made in good faith, but should not be coupled with improper conditions, such as to require her to part with a possible interest in his estate: *Ibid.*

Also *held*, that the treatment of the wife in such case by the children of her husband was such as to directly tend to impair her health, and that a divorce was properly granted: *Ibid.*

Where a separation is by mutual agreement, there can be no divorce on the ground of wilful desertion; but the fact that the wife lives apart from the husband and accepts support from him will not show consent to separation: *Ibid.*

To constitute an excuse for desertion of the husband by the wife, so as to prevent the same being a ground for divorce on the part of the husband, there must exist such facts as would in themselves authorize an action, on the part of the wife, for divorce: *Taylor v. Taylor*, 80–29.

Adultery: In a particular case, *held*, that the evidence did not establish adultery on the part of the wife, nor cruel and inhuman treatment on her part, such as to entitle the plaintiff to divorce: *Peavey v. Peavey*, 76–443.

Condonation: Where an action by the wife for divorce was dismissed upon an agreement of the husband to convey to plaintiff certain property, and to abstain from the use of intoxicating liquors, and the contract was reduced to writing, but the agreement to ab-

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stain was, by an oversight, omitted; and the property was conveyed, but the promise to abstain from drinking was not kept by defendant, who again became habitually intoxicated, in a new action for divorce upon the same ground, *held*, that the condition to abstain from drinking should be regarded as part of the contract, and that such agreement was no bar to the second action for divorce: *Lewis v. Lewis*, 75-200.

And *held*, that the wife would not be required to reconvey the property conveyed to her under the agreement, especially as she claimed nothing in the way of alimony: *Ibid.*

In a particular case, *held*, that cohabitation after commencement of suit for divorce did not constitute a condonation such as to defeat the action, in view of subsequent conduct of defendant: *Douglass v. Douglass*, 81-258.

The rule that cohabitation constitutes a condonation is of very doubtful merit in cases of cruelty, and unless the court is satisfied that the danger which is the basis for the separation no longer exists. The doctrine should be applied with caution where the object of the decree is safety to life: *Ibid.*

3415. Pregnancy of wife.

Where a woman is pregnant by another man at the time of their marriage, and such fact is unknown to the husband, he is under no legal obligation to live with his wife: *Brannum v. O'Conner*, 77-632.

3417. Maintenance during litigation.

Where an allowance was made on the application of the wife as defendant, to enable her to prosecute an appeal from a decree denying her a divorce on her cross-petition, and no such appeal was prosecuted by her, *held*, that on an appeal of the husband the allowance to the wife would be set aside: *Peavey v. Peavey*, 76-442.

3418. Attachment.

A conveyance of property made and accepted with the purpose of putting such property beyond the reach of an attachment for temporary alimony is fraudulent and invalid: *Picket v. Garrison*, 76-347.

The filing of a petition for divorce and asking judgment for alimony and that it be made a lien on defendant's real estate does not create a lien on particular property, nor is it sufficient to give notice to third parties: *Scott v. Rogers*, 77-483.

Upon a proper showing, the party seeking divorce will be entitled to an injunction to restrain the other party from disposing of property until the final disposition of the action: *Dullard v. Phelan*, 50 N. W. R., 204.

3420. Alimony; custody of children; changes.

Alimony: In a particular case, *held*, that an allowance of $2,500 as permanent alimony in favor of the wife, on a decree of divorce against the husband, who was shown to be well to do, was proper: *Day v. Day*, 50 N. W. R., 979.

Amount of alimony in particular cases, *held* not excessive under the circumstances: *Doolittle v. Doolittle*, 78-691; *Douglass v. Douglass*, 81-258.

The liability of the wife to the husband for the payment of a debt cannot be set off against her claim for alimony in a divorce proceeding: *Parker v. Albee*, 52 N. W. R., 533.

Therefore, a husband will not be barred from setting up such claim against the wife, in a subsequent suit brought by an assignee of the wife, on the judgment granting such alimony: *Ibid.*

Custody of child: Where the parents were divorced, and it appeared that the mother was not a proper person to have the custody of her child, *held*, that it was error to intrust the child to the custody of a brother of the mother, where there was no evidence to show that he was a proper person, or that the father was not a suitable person, to have the custody of the child: *Farrer v. Farrer*, 75-125.

Attorney's fees: The law does not imply liability of the husband as to attorney's fees for services rendered to the wife in a divorce proceeding brought by her in which she is unsuccessful and which was not necessary for her protection: *Sherwin v. Maben*, 78-467.

The supreme court may, on appeal, allow to the wife a reasonable attorney's fee for prosecuting the case on an appeal of the husband from a decree of divorce in her favor: *Doolittle v. Doolittle*, 78-691.

Changes: Where plaintiff in a former action had procured a divorce and the custody of her child, and a definite amount as alimony, and where it was shown that prior to the decree of divorce the parties had agreed that in case a divorce was granted plaintiff should have the custody of the child, and the amount decreed as her share of the property, *held*, in a subsequent action, that she was not entitled to an additional amount to be paid at stated intervals towards the support of the child, where it was not shown that there had been any change in the circumstances of the parties: *White v. White*, 75-218. And see *Reid v. Reid*, 74-681.

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CHAPTER 4.

MINORS.

3428. Majority.

Emancipation does not enable a minor to acquire by residence a settlement within the provisions of the poor law distinct from that of his father: *Clay County v. Palo Alto County*, 82–626.

3429. Contracts; disaffirmance.

A minor may disaffirm a chattel mortgage by selling the mortgaged property before he comes of age; and if the mortgaged property be taken from his possession under the mortgage without his consent, he may reclaim the same upon the disaffirmance of the contract: *Leacox v. Griffith*, 76–89.

In such cases it is not necessary that the minor return or offer to return the borrowed money, if it is no longer under his control, on becoming of age. He is not required to return money or property received from other sources: *Ibid.*

A disaffirmance of which notice was given to the opposite party within thirty-two days after the infant attained his majority, *held* to be within a reasonable time under the facts of the case: *Ibid.*

Where it appeared that defendant, having while a minor made a contract of lease of a farm, failed to work the farm under the lease, and before and after attaining majority gave notice of the rescission, and plaintiff thereafter took possession of the farm and leased it to another and received the produce, *held*, that the plaintiff could not recover for breach of the contract of lease: *Harrison v. Burns*, 51 N. W. R., 165.

3431. Payments.

Where a parent contracted with another for the custody and support of his minor child, *held*, that the minor might bring suit for breach of the contract to support, the parent, suing as next friend of the minor, thereby waiving any right of action in his own behalf: *Gooden v. Rayl*, 52 N. W. R., 506.

CHAPTER 5.

GUARDIANSHIP OF MINORS, DRUNKARDS, SPENDTHRIFTS, AND LUNATICS.

3432. Natural guardian of minor.

The mother as surviving parent is the natural guardian of her minor children, and in the absence of a guardian of their property is entitled to manage such of their property as is derived from the deceased parent: *Wood v. Murray*, 52 N. W. R., 856.

Where the parents had been divorced and it appeared that the mother was not a proper person to have the custody of her child, *held*, that it was error to commit the custody of the child to a brother of the mother, where it did not affirmatively appear that he was a proper person, or that the father was an unsuitable person, to have the custody of the child: *Farrer v. Farrer*, 75–125.

It is the legal as well as the moral duty of parents to furnish necessary support to their children during minority, and while a parent cannot be charged for necessaries furnished by a stranger for his minor child, except upon an express or implied promise to pay for the same, yet such promise may be inferred on the ground of the legal duty imposed: *Porter v. Powell*, 79–151.

While the duty to support rests upon both parents so that neither can maintain a claim against the other therefor, yet where by written agreement following a decree of divorce it was stipulated that the child should be supported by his father and should be in his custody, and the child without cause left the father's custody and lived with the mother, the father being notified of that fact, but refusing to agree to pay for his support, *held*, that no recovery for such support could be had by the mother: *Cushman v. Hassler*, 82–295.

The right of the parent to the child is not absolute, and the question of guardianship must be determined in view of the best interests of the child. The parent may lose the right of custody by misconduct or mistreatment. And in a particular case, *held*, that the character of the parent who sought to set aside the appointment of a guardian for his minor child was such that he had lost all right to have the custody of his child: *Lally v. Sullivan*, 51 N. W. R., 1155.

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3433. Appointment of guardian.

If the parents, or the one of them surviving, is not qualified to discharge the duty of care and custody, and to manage the property of the minor, the court may appoint a guardian for the purpose. Such a case arises when, from dissolute habits or other cause, the parents are not qualified and competent to have the care and control of the child, or, being qualified and competent for that, are disqualified and incompetent to manage the property; and the court may, where there is no parent, appoint one guardian for the person and another for the property: *Lawrence v. Thomas*, 51 N. W. R., 11.

The action of the court as to the appointment of a guardian of the person and property of a minor is reviewable only on assignment of errors: *Ibid.*

A party seeking appointment as guardian holds the burden of establishing his qualification, and the findings of the court on that question are entitled to the effect of a verdict: *Ibid.*

3434. Guardian of property.

While this section does require the appointment of a guardian in certain cases it does not affect the property rights of minors who fall within its provisions: *Knox v. Singmaster*, 75–64.

And where property was voluntarily conveyed by a father to his minor daughter, who reconveyed the same to her father soon after reaching her majority, *held*, that the daughter was entitled to the rental value of the property, less the amount paid for taxes, for the time she held the legal title: *Ibid.*

This section has no application where both parents are dead: *Lawrence v. Thomas*, 51 N. W. R., 11.

3437. Bond and oath.

This section applies not only to a guardian appointed under the provisions of § 3434, but whenever there is property of a minor, whether the appointment is general or limited: *Lawrence v. Thomas*, 51 N. W. R., 11.

A guardian who receives property of his ward, and wrongfully converts it to his own use, and makes no report thereof, is liable in an action on his bond, although no adjudication of default has been made by the probate court: *Robb v. Perry*, 35 Fed. R., 102.

3441. Duties.

Guardians of the property of their wards manage their interests under the direction of the court, and all money paid out should be paid under the court's order: *Coffin v. Eisiminger*, 75–30.

And where a judgment was rendered against a guardian as garnishee in a suit against his ward, and the guardian failed to pay the judgment and to ask instruction of the probate court in regard to it, *held*, that it was proper for the plaintiff to obtain an order of court to compel the guardian to do his duty: *Ibid.*

An assignment of a mortgage by a guardian after the ward is of age is valid in the absence of objection by the ward: *Hippee v. Pond*, 77–285.

3447. Settlement.

The settlement of the accounts of the guardian of an insane person will not constitute a former adjudication in an action to set aside a conveyance from the insane person to such guardian and for an accounting for the profits received by the latter from the property: *Warfield v. Warfield*, 76–688.

3449. Notice of sale.

A sale of land belonging to a ward by his guardian cannot be attacked by a collateral proceeding because the notice of the application to sell was served upon the ward three days before the appointment of the guardian, such defect not affecting the jurisdiction of the court: *Hamiel v. Donnelly*, 75–93.

3452. Bond.

The sale of land belonging to a minor by a guardian, without giving a sale bond, cannot be attacked in a collateral proceeding after the sale has been approved: *Hamiel v. Donnelly*, 75–93.

3454. Approval by court.

A mortgage of the ward's estate by the guardian is invalid unless approved by the court: *Dohms v. Mann*, 76–723.

While the judgment of a court on the foreclosure of such mortgage would be conclusive as to its validity if the parties were all before it, *held* that where the ward, though twenty years of age, was not served with notice, the judgment was not binding upon him: *Ibid.*

3463. Guardians of drunkards, spendthrifts and lunatics. 2272; 23 G. A., ch. 42, § 1. When a petition is presented to the circuit [district] court, verified by affidavit, that any inhabitant of the county is:

1. An idiot, lunatic, or person of unsound mind;

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2. An habitual drunkard incapable of managing his affairs;

3. A spendthrift who is squandering his property; and the allegations of the petition have been satisfactorily proved upon the trial provided for in the following section, such court may appoint a guardian of the property of any such person, who shall be the guardian of the minor children of his ward, unless the court otherwise orders. [R., § 1449.]

Such court may also appoint the guardian of the property of an habitual drunkard as the guardian of his person. If the person adjudged to be an habitual drunkard has no property, the court may appoint a guardian of his person.

[As amended by the addition of the last paragraph.]

The question to be determined in the appointment of a guardian for one claimed to be of unsound mind is whether such person is capable of managing his estate, not whether he is capable of managing it as well as such estates are commonly managed. If he is capable of transacting the ordinary business involved in taking care of his property, and if he understands the nature of the business and the effect of what he does, and can exercise his will with reference to such business with discretion, notwithstanding the influence of others, he is not of unsound mind within the meaning of this section, and should not be deprived of the control of his property: *Emerick v. Emerick*, 49 N. W. R., 1017.

It is error to instruct the jury in such a case that if the party is not possessed of sufficient strength of mind and ability to transact his business affairs with ordinary care and prudence, then under the law he will be deemed of unsound mind: *Ibid.*

In a particular case, *held*, that an allegation that the person for whom it was sought to have a guardian appointed was "incapacitated . . . for taking care of his property" was a sufficient statement of unsoundness to make it a case for the appointment of a guardian, in the absence of any objection to its insufficiency: *Guthrie v. Guthrie*, 51 N. W. R., 18.

While it is better to have the record show explicitly that the person for whom a guardian is appointed is adjudicated to be of unsound mind, the appointment of a guardian on an application based on that ground will be presumed to have been based upon the finding that the person in question was of unsound mind: *Ibid.*

The verification of the petition is not a jurisdictional matter: *Ibid.*

3463a. Order for restraint of drunkard. 23 G. A., ch. 42, § 2. The district court, or any judge thereof, may, from time to time, enter such orders as may be necessary, authorizing the guardian of the person of such habitual drunkard to confine and restrain him in such manner and in such place within the state as may, by the court or judge, be considered best for the purpose of preventing such drunkard from using intoxicating liquors, and as may tend to his reformation. Such orders may be modified, changed or vacated by such court, or any judge thereof until the guardianship shall be terminated as hereinafter provided. Such person shall, at all reasonable times, have the right to confer with his attorney; and he may, at any time, apply to the district court, or any judge thereof, for the modification or vacation of any existing order as to his confinement and restraint. Any application for the entry or modification or vacation of any order relative to such confinement or restraint, made by the guardian or his ward, shall be heard upon such notice to the other party as the said court or judge may direct.

3463b. Termination of guardianship. 23 G. A., ch. 42, § 3. At any time not less than six months after the appointment of such guardian, the person adjudged to be an habitual drunkard may apply to the district court, or any judge thereof, by petition in the guardianship proceedings, alleging that he has reformed, and is no longer an habitual drunkard, and asking that the guardianship may be terminated. Notice of such petition shall be served upon the guardian in such manner and for such length of time as the court or judge may direct, requiring the guardian to answer such petition at or before a time to be fixed in said notice. If the guardian shall file an answer denying the allegations of the petition, the court or judge shall try the issue, unless the person under guardianship shall demand a jury trial in which event the issue

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shall be tried in court by a jury as speedily as may be practicable. The costs of such proceeding shall be paid by the ward, unless the court or judge shall enter judgment terminating the guardianship, and shall find that the guardian resisted the petition therefor without reasonable cause, in which event the court or judge may tax the costs or any part thereof against the guardian. If any petition for terminating the guardianship shall be denied, no other petition shall be filed to terminate the guardianship until at least four months shall have elapsed since the denial of the former petition.

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TITLE XVI.

THE ESTATES OF DECEDENTS.

CHAPTER 1.

PROBATE JURISDICTION.

3509. Where vested.

The district court has original and exclusive jurisdiction of the persons and estates of those who require guardianship: *Coffin v. Eisiminger*, 75–80.

The district court, being a court of general and original jurisdiction, and also of probate jurisdiction, may determine an issue presented on the probate of a will, although the question is not one proper for determination in the probate court: *Leacox v. Griffith*, 76–89.

The probate jurisdiction is not exclusive of the jurisdiction of the federal courts in cases properly brought before them: *Clark v. Bever*, 139 U. S., 96.

The probate court does not have such exclusive jurisdiction of a guardianship that an action on a bond for breach of duty cannot be brought without an adjudication of default in the probate court: *Robb v. Perry*, 35 Fed. R., 102.

CHAPTER 2.

WILLS AND LETTERS OF ADMINISTRATION.

3522. Who may make will.

Evidence in a particular case *held* sufficient to support the verdict that testator was not of sufficient mental capacity to execute a will: *Seaward v. Carman*, 78–707.

Where a testator willed the greater part of his property to a friend and two of his sons, giving to only one of his own relatives any substantial part of it, and to the other relatives merely nominal amounts, in an action to set aside the probate of the will on the ground of undue influence and the weakness of the testator's mind at the time the will was executed, *held*, that the evidence was not sufficient to sustain the petition: *Malcomsen v. Graham*, 75–54.

In a particular case, *held*, that the question of testamentary capacity under the circumstances of extreme sickness of the testator should have been left to the jury: *Duggan v. McBreen*, 78–591.

Where the evidence was conflicting as to the alleged incapacity of the testator, and the undue influence by which it was procured, *held* that, the case not being triable *de novo* upon appeal, the finding of the jury would not be disturbed: *Primmer v. Primmer*, 75–415.

A will is not invalid because it provides for the disposition of the homestead or of property which may be liable for the payment of debts: *Ames v. Holderbaum*, 44 Fed. R., 224.

The execution of a will during the life of a testator is not a disposition of property, as the purpose of such instrument is simply to change the direction of the law as to the descent of property, and only becomes operative by the death of the testator: *In re Estate of Peet*, 79–185.

3534. Posthumous children.

Where a certificate in a mutual benefit association named the three children of the member in existence at the time of the issuing of the certificate as beneficiaries, and subsequently the member married again and after his death a child was born to him, *held*, that such child was not entitled to share in the benefit of the certificate: *Spry v. Williams*, 82–61.

3537. Heirs of devisee.

It seems that the term "heir" here used does not include the widow: *Phillips v. Carpenter*, 79–600.

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3540. Probate; jury trial.

Sufficiency of evidence offered on the probate of a will considered: *White v. Nafus*, 51 N. W. R., 5.

A proceeding to probate a will is not triable *de novo* upon appeal, and where the evidence is conflicting the finding of the jury will not be disturbed: *Primmer v. Primmer*, 75–415; *Seaward v. Carman*, 78–707.

Where a party in his own interests, and not as executor, seeks to have a will probated and is unsuccessful, the costs of the proceeding should be taxed to him: *Allen v. Leonard*, 52 N. W. R., 557.

It being presumed that the laws of another state are the same as those of this state, *held*, that a certificate of probate of a foreign will which did not show any steps corresponding to those required by this section was not sufficient in the absence of any showing that the proceeding was not in accordance with the laws of the state where it was had: *In re Capper's Will*, 52 N. W. R., 6.

3542. Certificate of probate.

The record of the transcript of a will filed in another county is not admissible evidence in proof of the will: *McCarty v. Rochel*, 52 N. W. R., 361.

The records here referred to are to be made and kept in the county where the will is probated: *Ibid.*

3544. Duty of executor.

Where the will directed the executor to mortgage the real property for the payment of debts, *held*, that it was his duty to do so, in the absence of any direction of the court to the contrary, and that a mortgage thus executed by him was binding upon the estate, and took priority over the claims of creditors upon the land: *Iowa Loan & Trust Co. v. Holderbaum*, 52 N. W. R., 550.

In such case the validity of the mortgage will not depend upon the disposition made of the funds realized thereon: *Ibid.*

3547. Failure to qualify.

There is no provision under which any person can be compelled to act as an executor, and if the person named in the will decline to accept the executorship, when the vacancy occurs, and upon proper application, an executor or administrator may be appointed: *Cable v. Cable*, 76–168.

3550. Trustees.

Where property was devised to certain trustees for the benefit of a certain church, *held*, that the fact that the church was unincorporated and was prohibited from taking or holding any property was immaterial, as the money was not devised to the church but to the trustees, who took it coupled with a trust, and as legatees charged by the testator with the duty of executing a charitable use and the benevolent purpose of the testator: *Seda v. Huble*, 75–429.

While the power here given to the court to remove trustees does not apply to legatees to whom property is bequeathed charged with certain trust duties in respect thereto, and although such legatees are exempt from giving bond, yet in view of the power and duty of courts of equity to see that such trusts are fully and faithfully carried out, and that they do not fail for want of a trustee to execute them, they may be removed on their refusal and others may be appointed to execute the trust; and such appointment may be made although there is an executor authorized to carry out the provisions of the will. Such executor would have no authority as to the management of the bequests to legatees in trust: *In re Estate of Petranek*, 79–410.

3551. Foreign administration.

Where administration is taken out in a state in which testator lived and died and in which he owned property, and is afterwards taken out, at the request of the first administrator, in another state in which the testator owned land, the first administrator is the principal and the second the ancillary administrator: *In re Estate of Gable*, 79–178.

And where sufficient assets for the payment of debts are not found under the control of the principal administration, any money assets remaining under control of the ancillary administration, after debts therein have been paid, should be transmitted to the principal administrator and not distributed to the heirs: *Ibid.*

Where decedent died in Vermont where she had previously resided and administration was there granted, but subsequently original administration was also granted in New York, where she had been for a time shortly before her death and where there was a note belonging to her, and the maker of the note, residing in Iowa, made payment thereof to the administrator in Vermont before the granting of papers of administration in New York, *held*, that such payment discharged the obligation of such maker, and that he could not be required to make payment under the administration granted in New York: *Bull v. Fuller*, 78–20.

The giving of notice is dispensed with under this section: *In re Capper's Will*, 52 N. W. R., 6.

In a particular case, there being nothing in the record of the probate of the will in the foreign state to show when, or in what court in such state, the will was probated, or that any court or judge ever passed upon the sufficiency of the proof offered and adjudged it sufficient, and that any order was ever made by any one duly authorized, admitting the will to probate, *held*, that the action of the lower court in admitting such will to probate was erroneous: *Ibid.*

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3552. Sale by foreign executor.

There is no provision similar to this with reference to domestic wills, and the record of the transcript of such a will filed in another county is not admissible: *McCarty v. Rochel*, 52 N. W. R., 361.

3553a. Conveyances under foreign wills legalized. 23 G. A., ch. 38. All conveyances of real property which have heretofore been executed by executors or trustees under foreign wills and which were thus executed prior to the expiration of three months after the recording of a duly authenticated copy of the will, original record of appointment, qualification and bond, as required by chapter 162 acts of the Eighteenth General Assembly [§ 3552] are hereby legalized and declared as valid and effectual in law as though the provisions of said chapter had been strictly followed; provided that the proper proof of authority shall have actually been a matter of record in the county where the real property is situated at the time the conveyance was executed or shall have been made a matter of record prior to the passage of this act.

3554. Setting aside probate.

A party who has not had notice of a probate proceeding and has not appeared therein and contested or waived his right to contest the probate in the manner prescribed by law is not estopped by such proceeding from prosecuting an original action in equity to set aside the will on the ground that it was executed through undue influence. For the purpose of rendering the probate proceedings conclusive on an interested party, notice by publication is not sufficient: *Gregg v. Myatt*, 78–703.

A probate proceeding in not a proceeding *in rem*: *Ibid.*

In an action to quiet title to property claimed under a will, defendant questioned the validity of the probate of the will; *held*, that the action was not one to recover real property and was barred in five years: *Willard v. Wright*, 81–714.

3555. Granting administration.

The court having acquired jurisdiction to appoint an administrator, the regularity or propriety of the appointment cannot be collaterally attacked: *Francisco v. Chicago, M. & St. P. R. Co.*, 35 Fed. R., 647.

3563. Bond; liability.

A surety on an administrator's bond would not become liable for the payment of money by an administrator to himself as entitled to a distributive share in the estate, in the absence of any maladministration or failure to perform orders of the court, and therefore would not become liable on a judgment against such administrator in a garnishment proceeding in which it should be sought to reach the fund and subject it to payment of judgment against the administrator as an individual: *Shepherd v. Bridenstine*, 80–225.

Where it appears that the executor is mismanaging the affairs of the estate, to the detriment of creditors, he may be required to give bond, although the will provides otherwise: *In re Estate of Holderbaum*, 82–69.

Where the estate was entitled to the benefit arising from the use of the land, and it appeared that the executor had used the land largely on his own account, *held*, that he was properly chargeable with its rental value: *Ibid.*

The court may properly refuse to accept an attorney as surety on an administrator's bond (see § 4141): *Cuppy v. Coffman*, 82–214.

3566. Letters, powers and liability of administrator.

Where a will authorizes a sale of real property by the executor and distribution of the proceeds to legatees, a sale regularly made in pursuance of this power cannot be set aside by the court on the application of the legatees offering to pay all charges on the land and asking to have it set apart to them in specie. The provisions of the will must be carried out: *In re Estate of Bagger*, 78–171.

Under the facts of a particular case, *held*, that the evidence in an action against the administrator individually by claimant, alleging that such administrator had been guilty of negligence and fraud, whereby satisfaction of the claim had been prevented, was not sufficient to support the judgment against the defendant: *Gault v. Sickles*, 52 N. W. R., 206.

It seems that at common law garnishment of an administrator is not permissible until a balance has been struck and a certain amount found due to distributees; and *held*, that where the widow as administratrix of her husband's estate had received a sum of money in which she was entitled to distributive share as widow, a judgment could not be rendered against her individually, as such judgment would not give the judgment creditor any higher right than he already had, the sureties on the bond of administratrix not being liable under such circumstances: *Shepherd v. Bridenstine*, 80–225.

In an action to enforce a claim due to an estate, the defendant may interpose a counterclaim held by him against decedent before his

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death, but cannot interpose claims acquired by him after decedent's death: *Wikel v. Garrison*, 82–454.

The enforcement against the estate of a counter-claim acquired before the death of decedent is not subject to the expenses of administration and claims of the administrator: *Ibid.*

In an action by an administrator to collect rent accrued after the death of the decedent, where the defendant, a corporation, asked to have an indebtedness of decedent for stock allowed as a set-off against the claim for rent, *held*, that defendant would have been entitled to offset his claim against his liabilities to decedent which had accrued at the time of his death, but as the rents in question had accrued wholly after the death of decedent and had become a part of the general assets of the estate, the claim of defendant could not be allowed: *Toerring v. Lamp*, 77–488.

No relief can be had in an action against an administrator with reference to the estate after his final discharge: *Richardson v. Haney*, 76–101.

3567. Notice of appointment.

By the notice here contemplated the court acquires jurisdiction of the settlement of the estate, and the provision as to notice before final settlement (§ 3680) is precautionary and not jurisdictional: *Van Aken v. Coldren*, 80–254.

3568. Limitation of grant of administration.

Where the time within which administration should have been granted has expired and it appears that the debts of decedent have been paid, the widow and heirs of decedent are owners in fact of his personal property and are entitled to maintain action in equity against one of the heirs who has improperly appropriated such property for the purpose of enforcing his trust and compelling an accounting: *Murphy v. Murphy*, 80–740.

3569. Foreign administration.

Where action is brought by a foreign administrator before securing the issuance to him of letters in the jurisdiction where the action is brought, the objection, if not in some manner raised, will be deemed waived: *McAleer v. Clay County*, 38 Fed. R., 707.

3571. Certificate of foreign appointment.

There is no such provision with reference to domestic wills: *McCarty v. Rochel*, 52 N. W. R., 361.

CHAPTER 3.

THE SETTLEMENT OF THE ESTATE.

3574. Inventory.

Where the executor set apart to the widow property of the estate to which she was not entitled, *held*, that he was properly chargeable with the value thereof: *In re Estate of Holderbaum*, 82–69.

3576. Life insurance.

See notes to § 1756.

3578. Appraisement.

The appraisement is for the purpose of an accounting with the administrator, and is not evidence against the estate in an action for the recovery of damages for the killing of animals belonging to the estate, unless to rebut the evidence of persons making the appraisement if called as witnesses: *Morrison v. Burlington, C. R. & N. R. Co.*, 51 N. W. R., 75.

3579. Allowance to widow and children.

The purpose of the statute is to provide support for the widow and children for one year from the time of the death of the decedent, and the amount required for such purpose is in the nature of a charge upon the estate, the claim of the widow and children to such allowance being of a higher character than that of the heirs; therefore, *held*, that real estate may be sold to raise the necessary amount, where the personal property is not sufficient for such purpose: *Newans v. Newans*, 79–32.

Nor will such claim be denied even though the widow has no children to support, and has property of her own, when it is shown that the income from such property is not sufficient to meet the expenses for the year: *Ibid.*

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3583. Discovery of assets.

Where it appeared that a note and money belonging to the estate were in the hands of decedent's father under a claim of a gift thereof to decedent's mother, but it appeared that such gift was not executed before decedent's death, *held*, that by a proceeding under this section, the father could be required under penalty of imprisonment to deliver over the property belonging to the estate: *Donover v. Argo*, 79–574.

But *held*, that the order of imprisonment should be so modified that it should not provide for the imprisonment of a person for not complying with an order of the court for the delivery of property when it is out of his power to do so: *Ibid.*

An appeal may be taken from an order made by the court in a proceeding under this section: *In re Estate of Pyle*, 82–144.

But where the only order of court in such proceeding was that the administrator bring action against the party complained of, to determine the right to the property in question, *held*, that such party had not such interest in the proceeding as to be entitled to appeal: *Ibid.*

3588. Rights of creditors.

A will may dispose of the homestead or of property liable for payment of debts: *Ames v. Holderbaum*, 44 Fed. R., 224.

3590. Sale of personal property.

Where it appears that deceased before his death had made a verbal sale of property, and received the consideration therefor, it is within the power of the court to direct the execution of a release: *Van Aken v. Clark*, 82–256.

3591. Sale of real property.

Claims against an estate are not liens upon the real property of decedent, and a mortgage placed upon such real property by the executor in accordance with the provisions of the will takes priority over such claims: *Iowa Loan & Trust Co. v. Holderbaum*, 52 N. W. R., 550.

The provisions as to sale of real property for the payment of debts do not conflict with the authority of the testator to prescribe that the property of the estate be sold, with or without such necessity: *Ibid.*

Where lands are converted into money for the purpose of paying the debts against the estate of a decedent, any of the proceeds shall be regarded as personal property, and, if in the hands of an ancillary administrator, must be transmitted to the principal administrator and not distributed to the heirs: *In re Estate of Gable*, 79–178.

A partition of the lands of an estate should not be ordered until it is determined that the personal estate is sufficient to pay the debts, but an action may be commenced, and if it does not appear when partition is made that it will be necessary to resort to the real estate to pay the debts, the decree partitioning the lands will not be disturbed: *Snyder v. Snyder*, 75–255.

The rights of devisees are inferior to those of creditors: *Spurgin v. Bowers*, 82–187.

3592. Application; proceedings; accounting.

While executors and administrators may ask leave to sell real estate before the debts are proven, it cannot be required that a creditor shall do so; and where a creditor had, within a reasonable time after his claim was established, proceeded in equity to compel the sale of real estate in the hands of heirs for the purpose of paying debts, *held*, that he was in time although more than ten years had elapsed after the probate of the will: *Schlarb v. Holderbaum*, 80–394.

Objection to the regularity of the proceedings for the sale of real estate on the ground that there was not a proper accounting as to personal effects cannot be considered to render the order of sale void; *Spurgin v. Bowers*, 82–187.

3593. Notice.

Failure to give notice to a devisee or his grantee, on application for sale of real estate, will not render the proceeding of the probate court void and open to collateral attack. Such party may at the proper time, upon application, be granted a hearing: *Spurgin v. Bowers*, 82–187.

Where in proceedings under a previous statute, which required such notice as the court might prescribe, it did not appear what notice was prescribed, but it did appear that the widow, for herself and also as guardian of her children, signed an instrument approving the conveyance and sale, *held*, that the proceedings were not subject to collateral attack: *Bacon v. Chase*, 50 N. W. R., 23.

3597. Public sale.

The interest of a mortgagee under a mortgage on the real property of the decedent made by the executor in pursuance of the directions of the will is not affected by a sale of such property under the order of the court, to which proceeding the mortgagee is not made a party: *Iowa Loan & Trust Co. v. Holderbaum*, 52 N. W. R., 550.

The purchasers of real property at a sale made by an executor in accordance with the directions of the will are necessary parties to a proceeding to set aside such sale: *In re Estate of Bagger*, 78–171.

An executor has the right to appeal from an order setting aside a sale which he claims to have made in pursuance of the provisions of the will: *Ibid.*

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3600. Bond to prevent sale.

The sale to which this section refers is one for the purpose of paying the debts and charges against the estate, and a sale made to carry into effect the will of the testator is not within its provisions: *In re Estate of Bagger*, 78-171.

Where the will provided for the sale of real property by the executor and the distribution of the proceeds to certain legatees, and it appeared that such sale was regular, *held*, that such legatees did not have a right, on tendering payment of all the charges on the estate, to have the sale set aside and the land set apart to them in specie: *Ibid.*

3603. Approval of conveyances.

Where the validity of a contract depended upon its approval by the orphans' court of another state, *held*, that such approval rendered the contract as effectual as if it had originally been executed and approved: *Frost v. Clark*, 82-298.

3606. Possession of real property by executor.

Before an administrator can recover rents of real estate which accrue after the death of the intestate, he must show that there is no heir present and competent to take possession of the premises: *Toerring v. Lamp*, 77-488.

Where the will made provision by which the widow and heirs were to continue in occupation of the common property for a considerable time, *held*, that such provisions were in conflict with the widow's dower right and could not be enforced without her consent, and therefore that they must entirely fail, not only as to the widow, but as to the heirs: *Howard v. Smith*, 78-73.

3607. Proceeds of rents.

The appropriation authorized by this section is not restricted to the rents issuing from real property of which the executor has taken possession because there is no heir present or competent to take it, but when the necessity of the appropriation has been shown and the heirs and devisees made parties to the proceeding, the profits of any other real estate left by the decedent may be applied to the payment of debts: *Toerring v. Lamp*, 77-488.

3610. Provisions of will control.

Testator may dispose by will of the homestead, or of property liable for the payment of debts: *Ames v. Holderbaum*, 44 Fed. R., 824.

Authority may be given to the executor by will to incumber the real estate for the payment of his debts, and such mortgage will take priority over the claims of creditors upon the real estate: *Iowa Loan & Trust Co. v. Holderbaum*, 52 N. W. R., 550.

And, where such direction was given and carried out without objection on the part of the creditors, *held*, that they could not afterwards claim that the mortgage was invalid because prejudicial to their interests: *Ibid.*

Where it appears that the executor is mismanaging the affairs of the estate, to the detriment of creditors, he may be required to give bond, although the will provides otherwise: *In re Estate of Holderbaum*, 82-69.

3612. Statement of claims; notice; allowance.

After the death of a mortgagor of chattels the mortgagee is not required to file his claim and await the slow process of administration to determine his rights, but he may proceed to foreclose by notice and sale, just as he could have done had the mortgagor survived: *Cocke v. Montgomery*, 75-259.

Where the claim was prepared for filing before the probate jurisdiction was transferred to the district court, and as thus prepared it was subsequently filed in the district court, after it acquired probate jurisdiction, *held*, that the omission to substitute the word district for circuit in the address was a formal error, which was waived by a failure to make objection in due time: *Ury v. Bush*, 52 N. W. R., 666.

While the statute provides for notice of the hearing of the claim, it does not fix the time within which such notice shall be given, even inferentially, as to claims of the third class: *Godes v. Hassen*, 81-197.

Where no notice was given to the administrator of the hearing of the application for the allowance of a claim, but the administrator appeared and interposed proper defenses, *held*, that notice was waived by the appearance: *McLeary v. Doran*, 79-210.

If the claim is approved by the administrator, no notice is required, and the claim may be allowed by the court, without further proceedings; and such approval by the administrator, or its equivalent, will prevent the claim becoming barred, under the statute of limitations: *Wilson v. McElroy*, 50 N. W. R., 55.

Where claims have been approved by the administrator they may be allowed by the clerk without notice; and where claims were thus approved and paid but not filed with the clerk within six months after notice of administration, *held*, that there being no substantial prejudice by reason of their not being filed, such payment by the administrator was not improper: *In re Estate of Wonn*, 80-750.

Although the court may approve a payment made by the administrator upon his own allowance, the claim is not established against the estate until it is approved by the court, by sanctioning the approval of the administrator, or by rendering judgment as in cases of contest: *Byer v. Healy*, 50 N. W. R., 70.

Upon a showing by heirs made at the same term at which allowance of claims against the estate were made, to the effect that such allowance was procured by fraud and collusion of the administrator, and that if the allowance was sustained they would be compelled to refund sums of money already paid to them out of the estate, *held*, that the court had authority to set aside such allowance: *In re Davenport*, 52 N. W. R., 197.

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3614. Denial of claim.

The denial of a claim against an estate puts in issue all matters upon which a defense to the claim could be based, usually set forth in a general denial: *Scovil v. Fisher*, 77–97.

It is not necessary for an administrator to file a written resistance to a claim, even though such claim is not filed within one year after notice of administration: *McLeary v. Doran*, 79–210.

Although no answer is filed to the claim, every allegation thereof is deemed denied unless admitted, and the burden is upon claimant to prove such allegations: *Lamm v. Sooy*, 79–593.

3615. Trial by jury.

The parties are entitled to a trial by jury: *Lamm v. Sooy*, 79–593.

Where a claim is allowed upon a final hearing, the validity of such claim cannot be contested by exceptions to the administrator's report, but if the court errs in allowing such claim, the error can only be corrected upon an appeal or by a proceeding based on fraud: *McLeary v. Doran*, 79–210.

3624. Order of payment of claims.

Where the administrator approved and paid claims against the estate which were not filed within six months as specified for making them claims of the third class, and the estate subsequently proved insolvent, *held*, that the administrator was nevertheless entitled to be credited with claims thus paid, it appearing that there was no prejudice to other claimants by reason of the omission to file claims with the clerk within the statutory period: *In re Estate of Wonn*, 80–750.

As to counter-claims, see notes to § 3566.

3625. Limitation.

A claim of the third class is not barred because not approved until after the expiration of twelve months from notice of appointment of an administrator; and a delay to bring a claim on for hearing will not operate as a bar or estoppel to prevent it being proved, unless the estate has been prejudiced by the delay: *Schriver v. Holderbaum*, 75–33; *Godes v. Hassen*, 81–197.

Where a claim was filed against an estate after the expiration of one year, and such claim contained no averments which would excuse the failure to file, *held* that, as it did not appear upon the face of the claim that it was not filed within the proper time, it was not demurrable; but even if it had so appeared, and a demurrer could have been interposed, that would not affect the jurisdiction of the court: *McLeary v. Doran*, 79–210.

Probate jurisdiction having been transferred, since the enactment of this section, from the circuit court to the district court, the fact that the claim is filed against the estate does not make it a claim pending in the district court in such sense as to take it out of the limitation provided for by this section: *Farmers', etc., Bank v. Creveling*, 51 N. W. R., 178.

In order that the claim shall be pending in the district court within the meaning of this section, it must be pending on the law or equity side thereof, as distinct from its probate jurisdiction. An action brought against decedent prior to his death, and continued against his administrator, would be a claim thus pending: *Ibid.*

The provisions of this section as to equitable relief are not intended to deprive the parties of a trial by jury as to the allowance of a claim; but it is for the court to first determine whether the circumstances are such as to entitle to equitable relief as against the bar of the statute: *Lamm v. Sooy*, 79–593.

Where a claim was against the decedent as surety, and it appeared that the creditor had delayed filing his claim pending the efforts to realize the amount thereof out of other securities, and presented the same to the administrator after six months, but within twelve months, and filed his petition for the allowance of the claim after twelve months, but as soon as he learned that the claim had not been allowed by the administrator, and that the estate still remained open, *held*, that he was entitled to equitable relief as against the bar of the statute: *Ibid.*

Where plaintiff was a resident of another state, and was informed by an attorney of that state that two years were allowed for proof of claims of the fourth class in Iowa, and, relying on such information, failed to file her claim until nearly two years after notice of administration, *held*, that the excuse for delay was not sufficient to entitle plaintiff to equitable relief: *Roaf v. Knight*, 77–506.

Where the claim against the estate depended on a pending litigation, of which the executor was thoroughly advised, and the estate remained solvent and unsettled, *held*, that the circumstances were such as to entitle the plaintiff to relief against the bar of the statute, no prejudice to the estate having resulted from the delay in filing the claim: *Sankey v. Cook*, 82–125.

Where a claim was properly prepared and placed in the hands of attorneys for filing, who delayed filing it for the benefit of the estate, the fact of the existence of the claim being known to the executor, who gave assurance that he would be paid, and the estate remained unsettled, *held*, that the circumstances were such as to entitle the claimant to equitable relief: *Ury v. Bush*, 52 N. W. R., 666.

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3631. Dividend declared.

Where an order was made for the payment in general of claims proportionally and the assets of the estate were thus distributed, and subsequently, certain creditors refusing to receive their *pro rata* share on the ground that they were entitled to preference, an order was made without the court's attention being called to the prior order, directing payment to be made to such creditors in preference to others, *held*, that a subsequent application to the court to correct and make of record by a *nunc pro tunc* entry its first order was properly sustained: *Jones v. Field*, 80–281.

3639. Judgment on executor's bond.

The tender by the executor of an amount claimed by him to be due a person entitled to a distributive share will be an admission of his liability to that amount, but will not be a discharge, and the benefit of such tender will be lost by a failure to keep it good, or pay the money into court when suit is brought. Therefore, *held*, that where the executor without authority to make such tender deposited the money in a bank to the credit of the heir, and the money was lost by the bank's failure, the executor was not discharged: *Rainwater v. Hummell*, 79–571.

CHAPTER 4.

THE DESCENT AND DISTRIBUTION OF INTESTATE PROPERTY.

3640. Personal property.

Until the estate is settled, the heirs are not entitled to any of the personal property which belonged to decedent: *Van Aken v. Clark*, 82–256.

The interest of the deceased partner in realty belonging to the partnership will be deemed personalty, so far as is necessary for the purpose of settling and closing up the business of the partnership: *Ibid.*

3644. Share of husband or wife in realty; dower.

Until the adoption of this section, the term dower was legally understood to refer to an interest in real estate only, but under the peculiar language of an ante-nuptial contract, *held*, that provision therein made for the wife was in lieu of her distributive share of personal as well as her interest in real estate: *Ditson v. Ditson*, 52 N. W. R., 203.

The wife's interest in the real property belonging to the husband cannot by contract between them be extinguished so that the wife cannot after her husband's death assert her dower right in property conveyed by the husband: *Shane v. McNeill*, 76–459.

Where in a foreclosure of a mortgage it appeared that a widow of the deceased under her dower right was entitled to one-half of the tract covered by the mortgage, *held* that, the dower right being established, one-third of the proceeds of the portion subject to the dower right should be set aside, but that judgment should not be rendered against the plaintiff therefor: *Gilman v. Sheets*, 78–499.

Where two tracts of land belonged to an estate, one of thirty-four acres and one of two hundred acres which included the homestead, and the court ordered that both tracts be sold, and the entire proceeds of the smaller tract and so much of the proceeds of the larger tract as might be necessary to satisfy the indebtedness of the decedent be applied to that purpose, and one-third of the balance remaining be applied upon the widow's claim for dower, *held*, that the decree was not erroneous because it did not limit the widow's interest to her homestead right in forty acres: *In re Estate of Rawlings*, 81–701.

A referee's sale in partition proceedings is a judicial sale by which a wife's right to dower may be extinguished, although she is not a party to the partition suit: *Williams v. Westcott*, 77–332.

In an action to foreclose a mortgage on real property for part of the purchase price, where it appeared that the plaintiff (vendor) had agreed to obtain a conveyance to defendant (vendee) from his wife of her dower interest in the land, and had failed to do so, *held*, that plaintiff was not entitled to relief: *Blasser v. Moats*, 81–460.

A mortgagor who dies is possessed at the time of his death only of what is left of his property after satisfying the mortgages, and his widow is entitled to one-third of what he possessed: *In re Estate of Gill*, 79–296.

A wife who has joined in a bond for a deed cannot complain that such instrument was without her knowledge intended only as security for a debt: *Steele v. Sioux Valley Bank*, 79–339.

3645. Homestead.

Where, in order to set off a widow's dower interest, it is necessary to sell the premises, the creditors cannot require that the widow's share of the proceeds be taken entirely from or include the proceeds of the homestead for the purpose of asserting their claims as against the proceeds of other property in the hands of the heirs, and avoiding the exemption of the proceeds of the homestead in the hands of the heirs under § 3183. In such case the share of the widow is to be taken from the whole: *Kite v. Kite*, 79–491.

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3646. Widow of alien.

The term "non-resident alien" as used in this section means an alien not residing in the state and not one who is a non-resident of the United States, and the purpose of the statute is to encourage the purchase of lands from non-resident owners and to protect purchasers of real estate against claims for dower or distributive share therein: *In re Estate of Gill*, 79-296.

Mortgagees of non-resident aliens are purchasers within the meaning of this section, and are entitled to priority over a claim for dower: *Ibid.*

3656. Share not affected by will.

Where there is no express provision in the will against dower, the provisions of the will are not to be considered as made in lieu of dower, unless the allowance of dower in addition to the provisions of the will would be inconsistent with and defeat some of the provisions of the will. And where the devise was specific, describing the particular property, both as to a life estate given to the widow and as to a remainder to heirs, *held*, that such provision should not be considered as in lieu of dower: *Parker v. Hayden*, 51 N. W. R., 248.

Where a testator devised a life estate to his widow and the property after the termination of the life estate to certain legatees, and the widow refused to take under the will but elected to take her dower interest, *held*, that the residuary legatees would be entitled to whatever remained after the payment of debts and the widow's claim for dower: *In re Estate of Rawlings*, 81-701.

Where a testator gave his wife one-third of the homestead property and the remaining two-thirds to his daughter, and the widow continued to occupy the premises as a home until her death, but had previously conveyed her interest in the property to defendant, *held*, that as her occupation was not exclusive and adverse to plaintiff, and was not continued for ten years, it could not be regarded as an election to take the homestead for life in lieu of her distributive share, and her deed to defendant was effectual to convey an undivided one-third of the property: *Larkin v. McManus*, 81-723.

A devise of a life estate will not bar the right of the widow to the distributive share of the real estate owned by the husband at his death: *Howard v. Watson*, 76-229.

The widow has six months after the notice here provided for in which to make her election, and she is not cut off by a failure to elect within six months after obtaining knowledge of the provisions of the will, no such notice having been given: *Ibid.*

A bequest to the wife of a life estate in personalty is inconsistent with her dower interest, and she cannot assert such right under the will unless she consents to the will in accordance with the provisions of this section. In the event of failure to thus consent to the provisions of the will within the time specified after notice, the right of the widow under the will is lost: *In re Will of Foster*, 76-364.

The rule in this respect in regard to the personalty is different from that recognized as to realty: *Ibid.*

Where provisions are made for the widow upon the condition that she shall accept under the will, they are deemed not to have been intended to be operative if the will is rejected, and by refusing to take under the will the widow makes the provisions of no effect, and cannot derive any benefit from them: *Stewart v. McFarland*, 50 N. W. R., 221.

It is not necessary that there should be a writing signed by the widow and made of record in order to manifest her election to take under the provisions of the will in lieu of dower; but if the record discloses any act or declaration of the widow plainly indicating the purpose to take under the will, she will be held to have so elected. Where it appeared that the widow joined in a report as executor, showing that by the will the widow was to have the use of the real estate for life, and made a final report reciting that the real estate is by said will given for the sole use and benefit of said widow, and signed a receipt closing up the estate, the report being approved by the court, *held*, that there was sufficient evidence to show an election by the widow to take under the will: *Craig v. Conover*, 80-355.

Consent to take under a will may be shown otherwise than by the record, and where the report of the executor showed that he had turned over all the personal property not sold to a purchaser thereof from the widow to whom it was bequeathed, such sale being evidenced by a deed of the widow, duly recorded, *held*, that the consent of the widow to take under the will sufficiently appeared: *Pellizzarro v. Reppert*, 50 N. W. R., 19.

The court cannot entertain jurisdiction of a proceeding by the guardian of an insane widow to have the acceptance of the will made of record until service has been had upon such insane person: *In re Hunter's Estate*, 51 N. W. R., 20.

Where in a proceeding to have dower set off, an order was made that a certain paper, claimed to be an acceptance of the provisions of the will, should be put on record, *held*, that such order was not one from which appeal could be taken: *In re Estate of Slauson*, 82-366.

3657. Descent.

Rents not accrued pass with the real estate out of which they are to issue to the heirs of the intestate, but accrued rent will pass to the administrator: *Toerring v. Lamp*, 77-488.

3659. Wife's share.

Although under this provision a widow takes as heir, yet the widow is not in general included in the term "legal heir." So *held* with reference to a certificate of insurance made payable to legal heirs: *Phillips v. Carpenter*, 79-600.

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CHAPTER 5.

ACCOUNTING AND MISCELLANEOUS PROVISIONS.

3679. Mistakes corrected.

This section does not authorize a proceeding to vacate an order of a court allowing a claim upon a hearing, unless it be made to appear that there was fraud or collusion between the administrator and the claimant: *McLeary v. Doran*, 79–210.

3680. Settlement contested.

Where reports of an executor have been approved, and have passed without objection for years, they cannot afterwards be opened up: *In re Estate of Holderbaum*, 82–69.

There is no provision requiring notice in case of final settlement, but this section contemplates that a notice may be given, and, if given, it has the effect to defeat the right to open settled accounts under its provisions: *Van Aken v. Coldren*, 80–254.

And *held*, that notice in compliance with general rule adopted by the judges, given by publication in the manner of serving original notice, was sufficient to defeat the account being opened up, a personal notice not being as matter of law essential. Notice in such cases is not jurisdictional, the estate being in court, of which persons interested must take notice: *Ibid.*

Where parties appear in the proceeding and offer evidence without objection in support of their exceptions to the report, and except to the finding and order of the court with reference thereto, it cannot be objected on appeal by such parties that they are not parties to the proceeding: *In re Estate of Wonn*, 80–750.

Where an administratrix approved and paid claims of the estate within six months of the notice of administration, but such claims were not filed as required to entitle them to be treated as third-class claims, *held*, that nevertheless no substantial prejudice had been suffered by other creditors and the administratrix was entitled to be credited with payment of such claims as third class: *Ibid.*

In the absence of a showing to the contrary, it will be presumed that the heirs had due notice of the application of the executor for a discharge: *Van Aken v. Clark*, 82–256.

Where the executors of a will filed their final report, by which it was shown that the widow claimed the personal property under the will, to which defendants excepted, claiming that she was entitled to a life estate only, in both real and personal property, and the court found that it was unnecessary to construe the will further than to hold that the widow was entitled to hold and control both real and personal property during her life, *held*, that it was the right of the parties to have the question determined, that the widow might deal with the property knowing what her rights were: *Bills v. Bills*, 77–179.

The right given to a party adversely interested to have an account opened is not an absolute one and in a proper case should be denied, but, as a rule, every person interested in the estate of a decedent can have an opportunity to present any objections to the report of the administrator before his final discharge; and while it may be that the burden is upon the plaintiff to overcome the presumption in favor of the correctness of the action of the court in approving the report, yet where the application was properly made by petition and defendant did not answer, *held*, that the averments of the petition stood confessed, and proof in support thereof was not required: *Van Aken v. Welch*, 80–114.

Where an interest in the estate was claimed by those whose right thereto was based on the interest of an immediate party deceased, *held*, that it appearing that there were no claims against the estate or intermediate party, the administrator of the first estate might make final settlements directly with those entitled to the proceeds of the estate of the intermediate party, without administration having been granted: *Hoffman's Estate v. Hoffman*, 81–292.

3681. Discharge.

Where the record shows that no notice has been given to a person clearly appearing to be interested within the meaning of rule seven of the probate rules, and notice has not been waived, the court has not authority to discharge the executor, and its action in doing so should be set aside: *Godes v. Hassen*, 81–197.

It is not necessary to entitle a party to have the discharge set aside for want of notice to him to show that the estate was solvent or that the executor at any time had assets from which the claim would have been paid. Prejudice will be presumed from the facts stated: *Ibid.*

After the discharge of an administrator no relief can be given in an action against him, with reference to the estate: *Richardson v. Haney*, 76–101.

3689. Executors in their own wrong.

Under particular facts, *held*, that one of several heirs taking possession of the personal property of the ancestor did so without right, and could, in an action by the others against him, be compelled to account: *Murphy v. Murphy*, 80–740.

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3693. Specific performance; parties.

This section is not unconstitutional as authorizing an order of specific performance in such case without notice to the heirs: *Van Aken v. Clark*, 82–256.

3700. Compensation of executors.

In a particular case, *held*, that services rendered by executors under agreement of the parties interested in the settlement of the estate were properly taken into account in allowing compensation, although the authority of the executors with reference to the real estate was doubtful, subsequent acquiescence of the persons interested in the report of the executor showing his charges being such as to preclude objection thereto: *In re Estate of Mansfield*, 80–681.

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TITLE XVII.

PROCEDURE IN COURTS OF ORIGINAL JURISDICTION.

CHAPTER 1.

PRELIMINARY PROVISIONS.

3709. Remedies classed.

Under a statute providing for the fixing of rates over connecting railroads by the railroad commissioners and a hearing before them as to the justness of such rates, *held*, that such hearing constituted a special proceeding and that the statute did not deprive the railroad of property without due process of law: *Burlington, C. R. & N. R. Co. v. Dey*, 82–312.

An appeal to the district court from the action of the board of supervisors in selecting papers for the publication of proceedings of the board is a special proceeding: *Starr v. Ingham*, 51 N. W. R., 175.

That the provisions of the Code concerning the prosecution of civil actions are to be followed in special proceedings so far as applicable, see § 3725 and notes.

3710. Civil action defined.

A proceeding for the appointment of a guardian for the person and property of a minor is not an action within the terms of this section: *Lawrence v. Thomas*, 51 N. W. R., 11.

3711. Special proceedings.

A proceeding for the appointment of a guardian of the person and property of a minor is a special proceeding within the terms of this section: *Lawrence v. Thomas*, 51 N. W. R., 11.

Proceedings to assess damages for a right of way taken by a railway are special proceedings within the meaning of this section: *Hartley v. Keokuk & N. W. R. Co.*, 52 N. W. R., 352.

3712. Form of actions.

Special proceedings are not classed as ordinary or equitable by the Code, and issues therein are triable by virtue of § 3947 by the court without a jury: *In re Bresee*, 82–573.

3713. Equitable proceedings.

An action to enforce an equitable lien is properly brought in equity: *Schafer v. Schafer*, 75–849.

A party is not estopped by bringing an action at law from amending his pleadings before the case has been finally submitted so as to change it into an action in equity: *Barnes v. Hekla F. Ins. Co.*, 75–11.

3718. Ordinary proceedings.

The word "action" as used in this section includes special proceedings, and is not used in the more limited sense as defined in § 3710: *Lawrence v. Thomas*, 51 N. W. R., 11.

An action to recover wages due upon a contract is not a cause for equitable cognizance: *Galliers v. Peppers*, 76–521.

3719. Error as to kind of proceedings.

Error of the plaintiff as to the kind of proceedings adopted is not a ground for demurrer: *Thomas v. Farley Mfg. Co.*, 76–785; *Riddle v. Beattie*, 77–168.

An action in which parties ask an accounting as to items omitted through fraud, accident or mistake, in a settlement had between them, is properly in equity. It is not error to refuse to transfer the same on motion to the law docket: *Donahue v. McCosh*, 81–296.

This provision has no application to double actions for the same thing: *Jamison v. Burlington & W. R. Co.*, 78–562.

An amendment to a petition may be allowed which changes the action from law to equity, or *vice versa*: *Newman v. Covenant Mut. Ins. Ass'n*, 76–56.

3721. Change on motion of defendant.

Defendant has the right to insist upon a ruling on his motion to transfer to the other docket before answering: *Ellis v. Butler*, 78–632.

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3722. Equitable issues in actions by ordinary proceedings.

Where neither party asks equitable relief, and no equitable defense is interposed, it is not proper to transfer to the equity docket an issue arising in an action at law. It is immaterial that in the reply plaintiff sets up matter which might be made the basis of a prayer for equitable relief, but which is only relied upon by way of confession and avoidance of the legal defense set up in the answer: *Price v. Ætna Ins. Co.*, 80–408.

In an action to recover possession of property under a chattel mortgage, the claim of the defendant being that the mortgage had been satisfied by conveyance of real estate, *held*, that the right of the defendant to foreclose the mortgage was not in controversy, and there was no equitable issue in the case: *Beroud v. Lyons*, 52 N. W. R., 486.

In an action on a note there is no occasion to transfer to the equity docket issues joined on the allegations of fraud and consideration, and whether the purchaser took for value before due, without notice. These questions are triable at law: *Richardson v. Monroe*, 52 N. W. R., 339.

Where pleadings were properly filed in probate, and the case was afterwards transferred to the equity docket, *held*, that there was no necessity for refiling such pleadings: *Winkleman v. Winkleman*, 79–319.

The objection to the action of the court in transferring a case to the equity docket cannot be first taken on appeal: *Gate City Land Co. v. Heilman*, 80–477.

There is no provision that issues at law arising in an action commenced in equitable proceedings shall be tried according to the method of trying law actions: *Ryman v. Lynch*, 76–587; *Frost v. Clark*, 82–298.

Therefore a defendant who by counterclaim in an equitable action raises an issue of law is not entitled to a jury trial thereof: *Ryman v. Lynch*, 76–587.

3724. Errors waived.

Where an action is brought in equity, and without objection by defendant is set for trial as an equitable action and tried in that manner, defendant cannot object to the method of trial on the ground that the action is solely cognizable at law: *McVey v. Manatt*, 80–132.

3725. Uniformity of procedure.

The provision that the averments of a petition shall be held true, unless denied, is applicable in a special proceeding to set aside the report of an administrator: *Van Aken v. Welch*, 80–114.

The statute of limitations is not applicable to a proceeding to assess damages for a right of way taken by a railway: *Hartley v. Keokuk & N. W. R. Co.*, 52 N. W. R., 352.

3726. Actions on judgments.

A party is not entitled to maintain an action which, if successful, would result in a personal judgment against defendant of no more binding force than the one which he already has: *Shepherd v. Bridenstine*, 80–225.

An application to the probate court for an order to compel a guardian to pay the amount of a judgment against him as garnishee, in a suit against his ward is not such an action upon a judgment that it cannot be brought within fifteen years without leave of court: *Coffin v. Eisminger*, 75–30.

Section applied: *Morrison v. Springfield, etc., Co.*, 51 N. W. R., 183.

3727. Judgments not annulled in equity.

Where an action was brought on account, but plaintiff afterwards elected to dismiss the same without prejudice, and the clerk by mistake entered judgment against him, and plaintiff had no knowledge of the mistake until the judgment so entered was pleaded in bar of a second action on the same account, and the court held the defense good and rendered judgment against him in the second action, *held*, that the last judgment must be considered a final adjudication of the claim, as a court of equity could not treat it as a nullity or set it aside: *Lowery v. Greene County*, 75–338.

3729. Successive actions.

While a breach of contract for continuing services, such as furnishing support to plaintiff, might be a ground for treating the contract as finally broken, and bringing action for the entire amount of the contract from the time of breach, yet the beneficiary is not bound to treat the contract as entirely broken, but may sue for damages accrued, and may maintain successive actions for subsequent damages: *McCay v. McDowell*, 80–146.

As to when successive actions are permissible, so that the bar of the statute of limitations will not cut off plaintiff's right, see notes to § 3784.

3731. Civil remedy for injuries causing death.

The damages in an action by the administrator, brought on account of injuries to intestate causing his death, are given on different principles and for different causes from those controlling where the action is brought directly by the person injured, and no allowance can be made for pain and suffering: *Dwyer v. Chicago, St. P., M. & O. R. Co.*, 51 N. W. R., 244.

In an action by the administrator of an infant two years of age, whose death was caused by defects in a county bridge, *held*, that the administrator could recover although the proceeds of such recovery would go to the parent of such child whose negligence contributed to the injury for which action was brought: *Wymore v. Mahaska County*, 78–396.

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3732. Actions by or against legal representatives; limitation.

Where a minor received injuries from which he died about two hours afterwards, *held*, that the cause of action for such injuries should be deemed to have accrued to the personal representative at the same time that it accrued to the minor, and that the action not being brought for two years was barred, the personal representative not being entitled to any extension of time for bringing the action on account of the minority of the decedent: *Murphy v. Chicago, M. & St. P. R. Co.*, 80–26.

CHAPTER 2.

LIMITATION OF ACTIONS.

3734. In general; period of.

In equity: When a party seeking relief in equity has been guilty of laches, so that it is doubtful whether the other party can produce the evidence which is necessary to a fair presentation of the case on his part, or when it appears that such party has been misled to his disadvantage by such misconduct, the court acts in obedience to the spirit of the statutes of limitation, and adopts the reasons and principles on which they are founded, rather than on their literal requirements: *Mathews v. Culbertson*, 50 N. W. R., 201.

Against state: The liability of an estate of an insane person for the expenses of his confinement in the asylum is to the county and not the state, and the statute of limitations commences to run as against such claim from the time the county pays to the state the amount of such expenses: *Harrison County v. Dunn*, 51 N. W. R., 155.

Against city: Where a city attempts to recover upon a contract, the statute of limitations may be interposed as a bar as in the case of persons: *Muscatine v. Chicago, R. I. & P. R. Co.*, 79–645.

Where it was claimed that by contract contained in a city ordinance, and the acceptance thereof by a railroad company, the company thereby became obligated to do certain grading on the street, *held*, that the lapse of more than ten years constituted a bar to the action: *Ibid.*

Special proceedings: The provisions of this section are not applicable to special proceedings, as, for instance, proceedings to assess damages for the taking of land for a right of way by a railroad: *Hartley v. Keokuk & N. W. R. Co.*, 52 N. W. R., 352.

In action for penalty under law of United States: When a cause of action is created by statute of the United States, the provisions of the state statute do not apply thereto, unless congress has so declared: *Welles v. Graves*, 41 Fed. R., 459.

When action accrues: Where the statute commences to run during the life-time of the person in whose favor the right originally accrued, its operation is not suspended by his death: *Grether v. Clark*, 75–383.

Where a party has two remedies the fact that he elects to proceed on one does not stop the running of the statute of limitations as to the other: *Garrett v. Bicklin*, 78–115.

Therefore, where it was claimed that property was wrongfully seized under attachment, *held*, that the right of action for damages for wrongful attachment accrued at once when the attachment was made, and not from the time of judgment in the attachment proceeding, and that it was immaterial that prior to the judgment plaintiff was pursuing his remedy by intervention in that proceeding to recover the property: *Ibid.*

The statute of limitations will not begin to run in favor of a bailee until he denies the bailment and converts the property to his own use: *Reizenstein v. Marquardt*, 75–294.

Where a party deposited a watch with defendant for repairs and safe keeping, and did not demand it for a period of ten years, when defendant refused to deliver it, *held*, that an action for its conversion might be brought any time within five years from the date of such demand and refusal: *Ibid.*

Where a contract between two district townships provided that the defendant district should pay a certain share of the indebtedness of the plaintiff, and should share *pro rata* in all discounts or money saved by compromise of any such indebtedness, and where the contract stated no definite time for payment, *held*, that as the plaintiff could at once demand judgment, and failed to do so for fifteen years, the action was barred by the statute of limitations: *District T'p v. District T'p*, 79–100.

Where the right of plaintiff to bring action depends solely upon demand being made, the running of the statute will not be prevented by failure of the plaintiff to make such demand: *Great Western Tel. Co. v. Purdy*, 50 N. W. R., 45.

Therefore in an action by a corporation for the payment of subscriptions of stock, where the call for such payment might have been made at any time upon an order for payment and notice thereof, *held* that, in the absence of any order and notice, the right of action became barred after the statutory period: *Ibid.*

A provision in a mortgage that upon default in the payment of instalments of interest or taxes, the whole indebtedness shall become due, is for the benefit of the mortgagee at his election, and such default will not stay the statute of limitations running against the indebtedness, in the absence of an election on

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the part of the mortgagee to take advantage of such provision: *Watts v. Creighton*, 52 N. W. R., 12.

The right of action upon a breach of covenant of seizin and good right to convey accrues when the covenant is broken, and is barred by the statute of limitations in ten years from the execution of the deed: *Mitchell v. Kepler*, 75–207.

By surety: A joint maker of a note who is in fact only a surety, and who pays or purchases the note, is not entitled to recover on the note, but his action is one for indemnity for the money paid, on the unwritten and implied agreement of his principal, and such action is barred in five years from the date of payment: *Harrah v. Jacobs*, 75–72.

In cases of trust: Where a party takes possession of property under such circumstances as to create a trust in him, the statute of limitations does not commence to run in his favor until he has in some unmistakable manner given to persons interested notice, or sufficient reason to know, that he claims the property adversely: *Murphy v. Murphy*, 80–740.

The statute of limitations against an action for the misappropriation of a ward's money after majority by the guardian in the purchase of land commences to run from the time of such purchase, and in the absence of concealment or fraud the action is barred in five years: *Potter v. Douglass*, 48 N. W. R., 1004.

Continuing actions: Where the plaintiff turned water from his land so that it flowed upon the land of defendant to his injury, *held*, that plaintiff had acquired no right to the flow of water as changed, by prescription, although the stream was diverted more than ten years before the action was commenced, in the absence of evidence that defendant had express notice, other than the mere use, that plaintiff's claim was adverse: *Preston v. Hull*, 77–309.

Where a railway company had stipulated in a right of way deed not to construct culverts in its embankment on plaintiff's premises, and thereby to keep the surface water from running upon plaintiff's land, *held*, that the right of action for damages resulting from the construction of such culvert would not accrue upon the construction of a wooden culvert designed to be of a temporary character, but only from the time of the construction of a permanent culvert: *Peden v. Chicago, R. I. & P. R. Co.*, 78–181.

In an action to recover damages resulting fram the construction of an embankment by a railway company causing the overflow of plaintiff's land, *held*, that it was error to admit evidence tending to show, for the purpose of avoiding the plea of the statute of limitations, that defendant constructed and attempted to maintain a ditch along such embankment for carrying off the water obstructed by the embankment: *Willetts v. Chicago, B. & K. C. R. Co.*, 80–531.

Where the franchises of a railway company wrongfully maintaining its track in the streets of a city without having had damages to abutting property owners assessed and paid were under foreclosure sold to defendant company, who continued to maintain such track, *held*, that defendant was a trespasser from the time it became the owner of such franchises, and that an action against it was not barred by reason of the fact that the track was originally constructed more than the statutory period before the commencement of the action: *Harbach v. Des Moines & K. C. R. Co.*, 80–593.

Damages from overflow of land due to negligence of a railway company in constructing and maintaining a culvert, such damages occurring at irregular intervals, *held* not to be such continuing damage that an action therefor must be brought within the statutory period after the construction of the road, but that plaintiff might recover for such damage occurring within five years prior to the bringing of action: *Hunt v. Iowa Cent. R. Co.*, 52 N. W. R., 668.

The repudiation of a contract will not authorize an action to be commenced prior to the time fixed for the bringing of such action by the terms of the contract: *McConnell v. Iowa Mutual Aid Ass'n*, 79–757.

An action for breach of contract to support during life is not barred by the statute of limitations so long as plaintiff lives: *Riddle v. Beattie*, 77–168.

A contract for the support of a person during life being a continuing one for breach of which the obligor would be liable at any time during the life of the beneficiary, an action for such breach is not barred by lapse of time during the life of the beneficiary, but the recovery will be limited to damages accruing within five years before the bringing of the action: *McCay v. McDowell*, 80–146.

Concealment: Where it was alleged that defendant having commenced an action to recover on certain notes, and for foreclosure of a mortgage securing the same, received full payment of the amount due, and agreed to dismiss the action, but failed to do so, and secured a decree and sale of the property thereunder, bidding it in at the sale, but subsequently concealed that fact and received payment of other instalments, *held*, that an action by plaintiff to set aside the foreclosure, though brought more than five years after the recording of the sheriff's deed, was not barred, the concealment being such as to prevent the statute from running, there having been a confidential relation between the creditor and the plaintiff, who was an ignorant woman, unable to understand the English language: *Jacobs v. Snyder*, 76–522.

Where the cause of action had been fraudulently concealed by the defendant, *held*, that the statute of limitations did not begin to run until the facts were discovered by plaintiff: *Cook v. Chicago, R. I. & P. R. Co.*, 81–551.

Where one school district received and appropriated from year to year for fifteen years the taxes from a certain territory, which were properly payable to another school district, *held*, that there was not an action on an open account nor any such fraudulent concealment of a cause of action as to entitle to recovery for the taxes thus wrongfully received beyond the statutory period of limitations: *District T'p v. Independent Dist.*, 80–495.

In a particular case, *held*, that action

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against a former guardian could not be maintained more than twenty years after the termination and settlement of the guardianship, there being no such evidence of fraud or fraudulent concealment as to entitle to relief: *Heath v. Elliott*, 49 N. W. R., 984.

Where it appeared that more than five years had elapsed after the alleged right of action to recover money advanced by one party to another had accrued, and no fraudulent concealment was shown, *held*, that the right of action was barred: *Duncan v. Finn*, 79–658.

Personal injuries: The action by the personal representative of a minor, for injury causing his death, must be brought within two years from the time of such injury, the personal representative not being entitled to any extension of time on account of minority of decedent: *Murphy v. Chicago, M. & St. P. R. Co.*, 80–26.

The provision as to actions for injuries to the person applies to all cases where an injury to the person is the basis of the damages sought to be recovered, although the right to maintain the action may be founded upon a statute, a contract or a tort. Therefore, *held*, that an action on contract against a physician for malpractice was barred in two years: *Fadden v. Satterlee*, 43 Fed. R., 568.

In such cases the statute begins to run when the injury is received, although its results may not be then fully developed: *Ibid.*

Action against officer: Where action was brought against a county auditor for money received by his predecessor in redemption from sale of property for city taxes, *held*, that the statute did not begin to run from the time of the receipt of the money by the predecessor, but from the time of its actual receipt by defendant on his accession to office: *Hintrager v. Richter*, 76–406.

The time for bringing action against an officer for damages in the wrongful levy of an execution commences to run from the time notice of ownership of the adverse claimant is served: *Bank of Reinbeck v. Brown*, 76–696.

Where illegal taxes are paid, the statute of limitations begins to run against an action for their recovery from the time of payment: *Eyerly v. Supervisors of Jasper County*, 77–470.

If an officer receives money as a private person, and not in his official capacity, an action for the recovery thereof would be barred in five years: *State v. Farrell*, 49 N. W. R., 1088.

By officer for fees: Where an officer seeks to recover fees against a party at whose instance they were incurred, under § 5117, he must bring his action within five years: *State Ins. Co. v. Griffin*, 51 N. W. R., 63.

To recover real property: In an action to quiet title to certain lands where the defendant filed a cross-petition alleging that the will, under which plaintiff claimed, was invalid, and that its admission to probate was fraudulently obtained by plaintiff, and where it appeared that the action was not commenced until more than six years after the will was admitted to probate, *held*, that as defendant's action was not for the recovery of real property, it should have been brought within five years, and would therefore be dismissed: *Willard v. Wright*, 81–714.

Adverse possession: The possession of land which will impart notice of title thereto must be adverse, exclusive, open, unequivocal and notorious, and must be inconsistent with the claim of any other person: *Elliot v. Lane*, 82–484.

Possession, to be adverse, must be actual, continuous, visible, notorious, distinct and hostile, and under claim of right or color of title: *Hempsted v. Huffman*, 51 N. W. R., 17.

Where a party took possession of land under a deed and held such possession for sixteen years without any adverse claim being made, *held*, that such possession being under color of title, gave such party title to the land, although the deed under which possession was taken was not properly acknowledged and therefore was not entitled to record: *Cramer v. Clow*, 81–255.

The title acquired by prescription through adverse possession is not merely defensive but is for all practical purposes a title, and an action to quiet title founded on such possession may be maintained: *Ibid.*

To constitute adverse possession the claim must be as broad as the possession, else the holder cannot be said to be holding under claim of right hostile to the true owner. If the claim is of right to a fence, without regard to whether that fence is on the party line, it will be deemed hostile: *Doolittle v. Bailey*, 52 N. W. R., 337.

Where it appeared that the property in question had been inclosed by the claimant thereof with adjacent property which he did not own and to which he made no claim of title, and which he used for a cattle yard and for other purposes, *held*, that as it appeared that his possession was not under claim of title, nor adverse to the real owner, no right could be maintained under it: *McCarty v. Rochel*, 52 N. W. R., 361.

Possession of the mortgagor will not be deemed adverse to the mortgagee or his assignee: *Watts v. Creighton*, 52 N. W. R., 12.

The statute of limitations against an action to recover real property does not commence to run from the time of obtaining an adverse title, but from the time of ouster: *Soreson v. Davis*, 49 N. W. R., 1004.

Conveyance by one co-tenant of his undivided interest will not constitute an ouster of the other co-tenants so that the statute of limitations will commence to run against their right: *Ibid.*

Possession taken under contract of sale of premises which have been the grantor's homestead, such contract being made by the husband alone, without the wife joining therein, may be adverse to the wife, so that after the statutory period the title of the vendee will be perfect as against any homestead right in the wife: *Boling v. Clark*, 50 N. W. R., 57.

Adverse possession commencing under claim of right to possession by virtue of a parol agreement between plaintiff and defendant, his father, that plaintiff should have the land in controversy in consideration of services performed in carrying on the farm of defendant in pursuance of a contract to that effect, *held* sufficient to constitute such adverse possession as would by the lapse of time ripen into perfect title: *Quinn v. Quinn*, 76–565.

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Adverse possession for ten years may show such title in grantor as to enable him to comply with the conditions of a contract under which he undertakes to make perfect title. While in such case there may be a possibility that the adverse claimant was under such disability as would bring the case within the exception of the statute of limitations, such fact cannot be presumed: *Hunt v. Gray*, 76–268.

Where an attempt was made to enter land under a military land warrant, but by mistake the entry and patent did not describe the land, *held*, that the statutory limitation based on adverse possession commenced to run only from the issuance of the corrected title covering the land in question, the title prior to the issuance of the patent being only an equitable one which would not have supported an action to recover the land. And *held* that in such case the second patent would not relate back: *Churchill v. Sowards*, 78–472.

Where land was granted to a railroad company on condition that it should complete its road by a certain time, and such condition was complied with, *held*, that its title became complete without any certificate or patent being issued therefor, and that ten years' adverse possession from that time would bar its title: *Cole v. Des Moines Valley R. Co.*, 76–185.

As between parties claiming under conveyances from the same grantor, there may be adverse possession; and in a particular case, *held*, that possession of a tract of land, which had once been laid out into lots and streets, but which had never been opened to public use, was held adversely to the city in such way as to cut off any rights of the city in such streets: *Smith v. Osage*, 80–84.

Constructive possession: In case of unoccupied land the owner is presumed to be in possession as against the holder of a void tax deed, and an action brought within ten years from the time possession is taken under such deed will not be barred: *Burke v. Cutler*, 78–299.

Transfer of title carries with it legal possession of unoccupied land: *American Emigrant Co. v. Fuller*, 50 N. W. R., 48.

Therefore, *held*, that a grantee under the swamp-land grant would be deemed in possession until title or actual possession in an adverse claimant was shown: *Ibid.*

And *held*, that failure on the part of the swamp-land claimant to take any action with reference to the land for five years after his title was questioned would not be considered an abandonment: *Ibid.*

Where premises were sold under order of a probate court, but a portion thereof incapable of cultivation remained unimproved, being in the meantime conveyed by the claimant under the probate proceedings, *held*, that the possession of such portion followed the deed given in the probate proceeding, and was adverse to the heirs claiming in hostility to such proceeding: *Bacon v. Chase*, 50 N. W. R., 23.

The right arising from constructive possession can have no application where the possession is actual. There can be no constructive possession where the actual possession is in another. Therefore, where a person who owns an undivided half interest in land, and claims title to the whole, is in actual possession, his possession will not inure to the benefit of the holder of the tax title of the other half, they not being tenants in common: *Willcuts v. Rollins*, 52 N. W. R., 199.

By mistake: Where a strip of land is held under a claim of right for the statutory period the title becomes complete by adverse possession, there being no material mistake as to the boundary line thereof: *Wilson v. Gunning*, 80–331.

Where the possession with reference to a boundary line is by reason of mutual mistake as to the true line, such possession will not be deemed adverse, so as to give rise to a title by prescription: *Heinz v. Cramer*, 51 N. W. R., 173.

In case of mistake of land-owners as to the division line in their lands, the person holding the lands as a part of his tract and believing it to be within his boundaries is not protected by the statute of limitations, and the rule is applicable in the case of the public using a highway supposed to be on a certain line, but which through mistake is not really upon it: *Bolton v. McShane*, 79–26.

Occupation by reason of mistake as to the boundary line does not constitute adverse possession as to the portion occupied by mistake: *Wacha v. Brown*, 78–432.

Possession of a strip of land under the claim that it is a portion of a tract owned by the person claiming title to such strip is not adverse as against the owner of the tract to which such strip actually belongs: *Fisher v. Muecke*, 82–547.

Highway: The claim of the public to the use of a strip of land as a highway may be lost by sufficiently long-continued adverse possession, in good faith, without any notice of the claims of the public: *Smith v. Gorrell*, 81–218.

Where a highway had been established but never opened or used by the public, what travel there was having been over adjacent land, and where there had been open, notorious and adverse holding by the defendant and her devisor for more than ten years, *held*, that the right of the public to the highway had been extinguished and defendant had a right to extend her fences to inclose the adjacent land: *Orr v. O'Brien*, 77–253.

Where a highway has been in fact opened in pursuance of proceedings therefor, and has been used by the public for the statutory period, the land-owner will be barred from questioning the rights of the public, although the proceedings for the location were void by reason of want of legal notice. The fact that the land-owner consented to the public use only by reason of the belief that the proceedings were valid would not affect the rights of the public acquired by prescription: *State v. Waterman*, 79–360.

Use of a strip of land as a highway in a particular case, *held* to be such as to show an establishment of the highway by prescription: *Sherman v. Hastings*, 81–372.

Where a right of way had been used for a time longer than the period of the statute of limitations, peacefully, continuously, uninterruptedly, openly and notoriously, and with the knowledge of the persons claiming ad-

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versely to the existence of such road, *held*, that the facts showed a highway by prescription: *McAllister v. Pickup*, 50 N. W. R., 556.

One who claims a right to an easement whenever it is obstructed, and denies the right of another to obstruct it, must be regarded to hold the easement adversely to the one who interferes with his enjoyment of it, and it is not necessary to show acts or declarations indicating that the use is adverse, except as there is occasion for making such claim: *Ibid.*

If the use of the road was begun under permission, but continued under a claim of right for the statutory period, a highway will be thereby acquired by prescription: *Ibid.*

Where a strip of land was recognized by the land-owner as a highway by constructing bars at each end thereof for the use of the public, and by abstaining from cultivating the same, and was used for that purpose by the public without objection, *held* that, although it thus remained inclosed, the owner could not claim rights therein adversely to the public by reason of his possession: *Hempsted v. Huffman*, 51 N. W. R., 17.

Where a highway has been laid out by a survey the lines of which have been for more than ten years recognized by the parties interested and the public as being correct, and improvements have been made with reference thereto, they will not be disturbed: *Crismon v. Deck*, 51 N. W. R., 55.

Under particular circumstances, *held*, that it did not appear that the land-owner had ever denied the right of the supervisor to open and work a highway in pursuance of action of the board of supervisors in establishing such highway, and that therefore the rights of the public had not been cut off by adverse possession: *Hayes v. Taylor*, 52 N. W. R., 116.

Further as to adverse possession of highway, see notes to § 1410.

On judgment: An action on a judgment is not an action on a written contract: *McAleer v. Clay County*, 38 Fed. R., 707.

The general statute of limitations is not applicable to judgment liens which expire and cease to be liens at the expiration of the time fixed by § 4089: *Albee v. Curtis*, 77-644.

3735. Fraud; mistake; trespass.

The fraud contemplated by this section is such as was heretofore solely cognizable in a court of chancery, and actions at law are not within this exception to the general statute of limitations: *Carrier v. Chicago, R. I. & P. R. Co.*, 79-80.

Therefore, where actions were brought against a railroad company for the recovery of unreasonable and excessive charges for freight, *held*, that the cause of action accrued when the charges were paid and not when the fact of the discrimination was discovered: *Ibid.*

But where the company had fraudulently concealed the fact that the amount paid by plaintiff was unreasonable and in excess of that paid by other shippers, *held*, that the cause of action did not accrue until the fact was discovered: *Ibid.*

An action to set aside a fraudulent conveyance will not be barred until five years after the discovery of the fraud, but it will be presumed to have been discovered when the fraudulent conveyance was recorded: *Hawley v. Page*, 77-241.

The use of funds of the ward by the guardian after the ward has come of age, in the purchase of land, gives rise to a right of action, which in the absence of concealment or fraud is barred in five years, whether the trust be considered as express or implied: *Potter v. Douglass*, 48 N. W. R., 1004.

In a particular case, *held*, that a party against whom judgment was rendered without jurisdiction did not have notice of the same, so that his cause of action to set aside the judgment was barred: *Jamison v. Weaver*, 51 N. W. R., 65.

In an action to set aside a guardian's deed made under order of court, on the ground of fraud, seven years after the ward had attained his majority, *held*, that the cause of action accrued when the fraudulent deed was recorded and was therefore barred by the statute of limitations: *Francis v. Wallace*, 77-873.

3736. Open account.

A payment made upon an account by an assignee of an insolvent debtor cannot be regarded as an item of the account for the purpose of determining whether the action on the account is barred: *Van Patten v. Bedow*, 75-589.

Where it appeared that plaintiff had been continuously employed for a number of years, though prices and rate of compensation had varied at times, *held*, that the employment being continuous the account of charges for services was continuous: *Kilbourn v. Anderson*, 77-501.

Damages for the breach of a continuing contract to furnish support cannot be considered to constitute an open account so as to prevent the statute of limitations from barring such damages as have accrued prior to the limitation of the statute: *McCay v. McDowell*, 80-146.

Under particular facts, *held*, that an account for items of labor, money advanced, and rent of a sewing machine, was not a continuous account, it appearing that there was, as to the items for labor, a break of at least two years, and that the later items for labor were for work done under a contract: *Gavin v. Bischoff*, 80-605.

3737. Commencement of action.

The sheriff is required to serve notices put in his hands for service, whether the parties to be served are residents of the county or not; and an action is sufficiently brought within the terms of this section to avoid the bar of the statute of limitations, if before the bar has accrued the notices are put into the hands of the sheriff for service, although some

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of the defendants are non-residents of the county: *Hampe v. Shaffer*, 76–563.

Neglect of duty by the sheriff in serving notices put in his hands will not defeat the rights of plaintiff accruing by delivery of the notice to the sheriff for service: *Ibid.*

Where an action is brought in the proper county, the delivery of the original notice to the sheriff of that county is a sufficient commencement of the action with reference to the statute of limitations, although defendant was a resident of another county in which notice was actually served: *Bracken v. McAlvey*, 49 N. W. R., 1022.

Where the claim is against an estate, the filing of the claim and such action by the administrator as to indicate the approval thereof are a sufficient commencement of an action to prevent the claim afterwards being barred by the statute of limitations, although no notice is actually served, service of notice of a claim being unnecessary, under § 3612, when the claim is approved by the administrator: *Wilson v. McElroy*, 50 N. W. R., 55.

In an action upon account, where the notice was served more than a month before the account would have been barred by the statute of limitations, but the notice stated that the term of court at which defendants were required to appear would commence on the 30th day of August, when in fact it would begin on the 31st day of that month, and the cause was continued at that term and a second notice served on defendant, which was delivered to the sheriff more than five years after the date of the last item of the account, *held*, that the first notice was fatally defective, and that its delivery to the sheriff and its service did not arrest the operation of the statute of limitations and the action was barred: *Fernekes v. Case*, 75–152.

For most purposes the action is not commenced until the service of notice as provided by § 3804. The special provisions of this section with reference to the statute of limitations are not applicable under § 1888, with reference to actions attacking a tax deed: *Hintrager v. Nightingale*, 36 Fed. R., 847.

3738. Non-residence.

The presumption arises that parties to actions are citizens of the state, and that the cause of action arose in the state, unless the contrary is shown; and when the plaintiff relies upon the non-residence of defendant or the fact that the contract was made in another state to defeat the defense of the statute of limitations, these facts must be pleaded in the petition or in a reply to defendant's answer: *Van Patten v. Bedow*, 75–589.

The lien of a judgment terminates at the end of ten years (§ 4089) regardless of the residence of defendant, and the time of redemption from a sale under a mortgage is not extended by the fact that the purchaser is a non-resident: *Albee v. Curtis*, 77–644.

3740. Minors and insane persons.

This exception to the statute of limitations in favor of minors applies to such causes of action as accrued originally in their favor, and has no application to such as come to them by descent, and against which the statute had already begun to run: *Grether v. Clark*, 75–383.

Therefore, where an ancestor foreclosed a mortgage against the mortgagor only, not making the grantees of the mortgagor who were in possession parties, and afterwards died leaving minor heirs, *held*, that his right of action against the grantees, having accrued before his death, was barred as against his minor heirs in ten years from the time it accrued: *Ibid.*

The fact that the owner of a cause of action is a minor when it accrues will not prevent the running of the statute, and upon the death of the minor the action is to be deemed (under § 3732) to have accrued to the personal representative at the same time that it did to the minor: *Murphy v. Chicago, M. & St. P. R. Co.*, 80–26.

3744. Admission, or new promise.

It is not necessary that there be both an admission that a debt is unpaid and a new promise to pay, but either alone is sufficient: *Stewart v. McFarland*, 50 N. W. R., 221.

While an admission contained in a will may be sufficient to revive the debt, yet, in a particular case, *held*, that the direction in the will that a specified sum shall be paid to the widow "in full payment of her note against me," such direction being in connection with other bequests, and the amount due on the note being greater than the amount thus bequeathed, and it being stipulated that the provisions of the will should be in lieu of dower, *held* not a sufficient admission of indebtedness to revive the debt: *Ibid.*

Where an assignment was made for the benefit of creditors and an account recognized and included in the sworn schedule of claims, *held*, that while this was not a new promise, but only an admission that the account was unpaid, still if it were a promise, such promise and admission would not authorize an action upon the account more than five years after the revivor: *Van Patten v. Bedow*, 75–589.

A letter which referred to "those old notes" and said: "I have no money now, but you shall have every cent that is due on them," *held* not to be an admission that anything was due on a particular note and a promise to pay an amount on it, and therefore not sufficient to revive the debt on the note which was barred by the statute of limitations: *Stout v. Marshall*, 75–498.

In an action upon two promissory notes which upon their face appeared to be barred by the statute of limitations, but where it appeared that before the bar of the statute defendant had, in a letter, referred to an existing indebtedness and to the fact that he had paid interest due and not due upon the same, *held*, that the letter was an admission of indebtedness, and if plaintiff could prove that the notes in suit constituted a part of such in-

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debtedness, the cause of action was revived by the letter: *Miller v. Beardsley*, 81-720.

A judgment cannot be revived by an admission: *McAleer v. Clay County*, 88 Fed. R., 707.

The written admission or new promise should be signed by the party to be charged therewith. And *held*, that in a case of a judgment against a county there was no one having authority to sign such admission: *Ibid.*

3747. Action in favor of school fund.

Where money intended to be given in place of bail was paid to the sheriff, who was not authorized to receive it, *held*, that upon a forfeiture of bail such money did not become a part of the school fund, and an action to recover the same would be barred: *State v. Farrell*, 49 N. W. R., 1038.

CHAPTER 3.

PARTIES TO AN ACTION.

3748. Party in interest.

One to whom a note is indorsed for collection may bring action thereon as the real party in interest: *Abell Note, etc., Co. v. Hurd*, 52. N. W. R., 488.

Where a note had been indorsed to and was in the possession of plaintiff, and the petition alleged that it was owned by him, which allegation was not controverted by defendant, although the answer contained a general denial of matters not admitted, *held*, that the proof of ownership was sufficient: *Farmers' Bank v. Arthur*, 75-129.

Where the note in suit had been transferred to plaintiff without indorsement or written assignment, and he had given his check therefor, *held*, that he was entitled to bring action on such note, although it did not appear that the check had been paid: *Harlan v. Ash*, 50 N. W. R., 41.

Where a partner enters into a contract for the firm, action thereon may be brought in the firm name without joining the partner as a party: *Marsh v. Chicago, R. I. & P. R. Co.*, 79-332.

A garnishee has such interest in the subject-matter of a judgment against him that he may bring action in equity to set it aside for fraud: *Searle v. Fairbanks*, 80-307.

Where an agent of a manufacturer made a contract to sell a machine which he was not entitled to make as agent but which he claimed to make for himself, he being responsible to the company for the machine sold, *held*, that he might maintain action on the contract in his own name: *Jackson v. Mott*, 76-263.

A third person in whose favor a contract is made, but who is not a party thereto, may sue thereon: *Knott v. Dubuque & S. C. R. Co.*, 51 N. W. R., 57; *Gooden v. Rayle*, 52 N. W. R., 506.

Where one person makes a promise to another for the benefit of a third, the party to be benefited may maintain an action on the promise, but if the primary object was to subserve the interests of either one or both of the parties to the contract, they alone can maintain an action for its breach, even though a benefit might have resulted to a third party from its performance: *Messenger v. Votaw*, 75-225.

Where money was contributed to an auxiliary society for the benefit of a church, *held*, that the church was the proper party to sue for such money: *First M. E. Church v. Sweny*, 52 N. W. R., 546.

A tax-payer may maintain a proceeding by *certiorari* to review an action of the board of supervisors whereby his taxes are wrongfully increased: *Goetzman v. Whitaker*, 81-527.

A non-resident tax-payer may maintain an action to enjoin a city from improper disposition of city property: *Brockman v. Creston*, 79-587.

Nor can the motives of a party in such case be inquired into: *Ibid.*

As to parties in a suit by injunction to restrain official action, see, also, notes to § 4622.

3749. Exception in case of executor, guardian, or trustee.

Where a contract of insurance was made by the guardian in her own name, but with the knowledge on the part of the company that the title of the property was in the minor, *held*, that action on such contract could be brought by the guardian in her own name: *Jemison v. State Ins. Co.*, 52 N. W. R., 185.

The township trustees and clerk of a township are not the trustees of an express trust in such sense as to be entitled to recover from the county money due to the township or the local board of health for expenses of the board of health: *Sanderson v. Cerro Gordo Co.*, 80-89.

3750. Plaintiffs joined.

The fact that persons are joined with plaintiff who have no interest in the action is not a ground of demurrer: *Grayson v. Willoughby*, 78-83.

Creditors having separate claims may maintain an action in equity to discover and subject property of their common debtor to the payment of their judgments: *Gorrell v. Gates*, 79-632.

The owners of three separate accounts can-

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not join in an action thereon: *Faivre v. Gillan*, 51 N. W. R., 46.

Where a policy of insurance is issued to two persons jointly on property owned by them severally, such owners can join as plaintiffs in an action to recover under the policy: *Graves v. Merchants', etc., Ins. Co.*, 82–637.

An administratrix of the deceased partner should not be joined with the survivor in an action against the firm's debtor: *Robinson v. Hintrager*, 36 Fed. R., 752.

3752. Defendants.

Where parties are interested in the controversy adversely to the plaintiff, and are liable to plaintiff in the same cause of action (in tort) they are properly joined as defendants: *Knott v. Dubuque & S. C. R. Co.*, 51 N. W. R., 57.

The purchasers of real property at a sale made by the executor in accordance with the directions of a will are necessary parties to a proceeding to set aside such sale: *In re Estate of Bagger*, 78–171.

In an action by a fraudulent grantee to enjoin the sale of land under an execution against the grantor, the grantor is not a necessary party: *Dunn v. Wolf*, 81–688.

A grantor of property claimed to have been fraudulently transferred by a debtor to defraud creditors is not a necessary party in an action to subject the property to the payment of debts: *Capital City Bank v. Wakefield*, 48 N. W. R., 1059.

Where the mortgagor has parted with all his interest in the property, and no personal judgment is sought against him, he is not a necessary party to an action to foreclose the mortgage: *Watts v. Creighton*, 52 N. W. R., 12.

3755. Joint and several obligations.

Judgment may be rendered against a surety who makes default prior to the determination of the suit and the rendition of the judgment against the principal. And in such case the surety is not constructively in court after the judgment against him, and is not bound by the subsequent proceedings: *Okey v. Sigler*, 82–94.

3756. Other parties brought in.

In an action on a policy of insurance, *held*, that a motion to make other persons who claimed to have acquired by assignment the right to sue on such policy, parties to the action, was properly overruled: *Kelley v. Norwich F. Ins. Co.*, 82–137.

A party who, after having by pleadings claimed that another person is a necessary party to the suit, has procured an order making him a party, cannot afterwards insist that such order is not necessary and that judgment is valid, although rendered without jurisdiction over such party: *Ibid.*

As to who are necessary parties defendant, see notes to § 3752.

3757. Suit on bond.

Where a county treasurer fails to pay over or account for taxes collected to aid in the construction of a railroad, the railroad company is the proper party to bring an action on the treasurer's bond: *Cedar Rapids, I. F. & N. R. Co. v. Cowan*, 77–535.

Where a third party claimed to own certain property levied upon under execution, and entered into a written contract with the plaintiff to hold said property or its proceeds subject to the order of the court, in an action for breach of the contract, *held*, that the instrument was intended as security for plaintiff, in whose interest the execution issued, and that plaintiff would have the same right to bring suit thereon as in the case of an official or statutory bond: *Allen v. Pratt*, 79–113.

3758. Partnership.

A partnership is a distinct legal entity, capable of transacting business and making contracts, and may sue and be sued in the partnership name: *Brumwell v. Stebbins*, 49 N. W. R., 1020.

For many purposes the partnership is as distinct from the persons composing it as they are from each other. For the purpose of suit the partnership may have a residence distinct from the residence of its members: *Ruthven v. Beckwith*, 51 N. W. R., 153.

Where the action is against a partnership not residing or doing business in the state, a member thereof who does reside in the state has not the right to have the action removed to his county: *Sketchley v. Smith*, 78–542.

3760. Action for seduction.

In an action by a female for her own seduction it is not necessary to show by direct evidence that she is unmarried. That fact may be inferred from the circumstances. Nor is it necessary, under the issue arising upon a general denial, to prove that the damages have not been paid: *Egan v. Murray*, 80–180.

3771. Defense by minor.

Where a guardian is served, but does not appear, and makes no defense, the judgment rendered is without jurisdiction as to the minor, and void: *Dohms v. Mann*, 76–723.

Where the pleadings and evidence in a particular case failed to show the fact that one of the defendants was a minor, *held*, that it would be presumed that she was of age and competent to make her own defense: *Deere v. Wolf*, 77–115.

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3774. Action by insane person.

Where a person has been judicially found to be of unsound mind in a proceeding authorized by law, an action by him must be brought by his guardian, and not in his own name. If brought in the name of the ward it will be dismissed: *Chavannes v. Priestley*, 80–316.

3775. Defense by insane person; guardian.

There is no authority to appoint a guardian *ad litem* for an insane person before service of notice on such person: *In re Hunter's Estate*, 51 N. W. R., 20.

Therefore, *held*, that the court did not have jurisdiction of a proceeding by the guardian of an insane widow who had received a devise under her husband's will to have a record made of the widow's acceptance of the devise until notice had been served on the insane person: *Ibid.*

3779. Substitution of party for sheriff.

Where property was levied upon under an execution and a third party claimed to own said property and entered into a contract with the party in whose favor the judgment was rendered, to the effect that he would hold said property or its proceeds subject to the levy, in an action for the breach of the conditions of the contract, *held*, that the proceeding was not such as is contemplated by this section, and that the party in whose favor process was issued was a proper party to the suit, though not substituted by the court: *Allen v. Pratt*, 79–118.

CHAPTER 4.

PLACE OF BRINGING SUIT.

3781. In relation to real property.

An action under § 4508 to establish disputed boundaries may be brought in the county in which one of the tracts in question is located, and the court will have jurisdiction, although the adjoining tracts are in another county: *Tooman v. Hidlebaugh*, 49 N. W. R., 79.

3785. Attachment.

An action against a non-resident corporation may be maintained when aided by attachment of property found within the state, and the judgment of a federal court in a former suit founded on the same cause, dismissing the action for want of jurisdiction of the person, will not bar a subsequent action when aided by attachment: *Weyand v. Atchison, T. & S. F. R. Co.*, 75–578.

Section applied: *German Bank v. American F. Ins. Co.*, 50 N. W. R., 53.

3786. Place of contract.

Where the terms of a written contract of sale of a wagon provided that it should be paid for on delivery, one-half in cash and a note for the other half, "said amount to be settled by note at Algona, Iowa, on receipt of goods," *held*, that the contract was to be performed at Algona within the terms of this section, and that an action for non-payment could be brought in that county: *Bradley v. Palen*, 78–126.

3787. Common carriers.

A railroad, operating a line of road in the county at the time suit is commenced against it there, is subject to jurisdiction of the courts of that county: *Knott v. Dubuque & S. C. R. Co.*, 51 N. W. R., 57.

3789. Insurance companies.

A provision in a certificate of mutual benefit insurance by which it is stipulated that action shall not be brought thereon except in a certain county named is not valid: *Matt v. Iowa Mutual Aid Association*, 81–135.

3790. Office or agency.

A partnership may be considered as having a residence in the county in which it does business, though neither partner resides in such county: *Ruthven v. Beckwith*, 51 N. W. R., 153.

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3791. Place of residence.

Where an action is brought against a non-resident, and he is served in the state, but in a different county from that in which the action is brought, the only remedy is a motion for change of place of trial to the county of service. If such motion is not made the judgment will not be void for want of jurisdiction: *Marquardt v. Thompson*, 78–158.

Where action is brought by attachment against a non-resident partnership, the fact that one of the partners resides in another county of the state will not entitle him to have the action changed to such county: *Sketchley v. Smith*, 78–542.

3794. Change when suit brought in wrong court.

Failure to move to transfer to the proper county will waive the objection that an action against a non-resident is brought in another county of the state than that in which he was served with notice: *Marquardt v. Thompson*, 78–158.

A defendant who is merely a nominal party to the cause cannot compel a change in the place of trial without the concurrence of the real parties in interest: *Omaha & St. L. R. Co. v. O'Neil*, 81–463.

The question as to the place to try the action having been determined on a motion for change of venue, *held*, that it was not proper by averments in the answer to raise an issue on that question for the purpose of having an attorney's fee taxed against plaintiff for bringing action in the wrong county: *Kelley v. Cosgrove*, 48 N. W. R., 979.

Action of the court in its ruling in sustaining a motion to dismiss the case because the costs were not paid within the prescribed time, *held* not to be open to review in the absence of a showing in the record on appeal that the supreme court had before it all the evidence and the facts upon which the court acted: *Smith v. Yager*, 50 N. W. R., 224.

Where a motion for change of place of trial was made, but did not appear to have been ruled on, and no exception to the action of the court was shown, *held*, that the motion would be deemed waived: *Knott v. Dubuque & S. C. R. Co.*, 51 N. W. R., 57.

CHAPTER 5.

CHANGE OF PLACE OF TRIAL.

3795. Grounds for.

Where three disinterested citizens of the county make affidavit that they have read the affidavit of the applicant for a change, stating the prejudice of people of the county and the undue influence of the attorney of the opposite party, and that such statements are true, the application is sufficient under the statute. It is not necessary that the applicant and the three citizens sign and swear to the same affidavit: *Deere v. Bagley*, 80–197.

In order that the influence of the attorney of the opposite party over the inhabitants of the county shall be such as to entitle a party to a change, it is not necessary that such influence shall have been acquired by improper methods, the material inquiry being whether the attorney has in fact such undue influence. The fact that the opposite attorney as a candidate for political office had at the preceding election received an unprecedented vote in the county, *held* to be sufficient grounds for a change: *Ibid.*

Even though no counter-affidavits are filed, and the persons making the affidavits for the change are not brought into court for examination, the court may exercise its discretion in granting such change. In such case the court should act upon the facts as they appear, considering its own knowledge in the premises; and where the ground for change was previous misconduct of the judge in the case, *held*, that a refusal to grant the change might properly be considered as a denial of such misconduct, and the action of the judge in refusing to grant the change would not be reversed: *Garrett v. Bicklin*, 78–115.

It being claimed that reversal of previous action of the court presided over by the same judge in the same case was an indication of prejudice or ill-will, *held*, that such reversal was not an indication of bias in the former action: *Ibid.*

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CHAPTER 6.

THE MANNER OF COMMENCING ACTIONS.

3804. Original notice.

An original notice which states the term at which the defendant is required to appear, but does not state the correct date, is fatally defective and confers no jurisdiction: *Fernekes v. Case*, 75-152.

The original notice in a suit on a promissory note, following the language of the note, omitted the word "dollars." *Held*, that the notice was sufficient to show that plaintiff claimed a certain sum in money, and that the case was one, therefore, of defective notice, and not of entire want of notice, and the defect, not having been objected to, could not be raised on appeal: *Gray v. Wolf*, 77-630.

It seems that an original notice should be addressed to the person intended to be served: *Steele v. Murry*, 80-336.

In an action to foreclose a mortgage it is not required that the land should be described in the original notice: *Lindsey v. Delano*, 78-350.

Therefore, *held*, that a mistake in the description with reference to the number of the township did not render the judgment void. It appeared, however, that the land was otherwise sufficiently described in the notice: *Ibid.*

The provisions of this section determine what is the commencement of an action in all cases except those specially provided for by § 3787 in regard to the general statute of limitations: *Hintrager v. Nightingale*, 36 Fed. R., 847.

3805. Discontinuance.

Where notice is given by publication and the petition is on file before the first publication of the notice, it is sufficient, although the petition is not on file by the time named in the notice: *Oliver v. Davis*, 81-287.

3806. Who may serve.

The deputy of a sheriff who is a party to a case is disqualified from serving notice: *Gollabitsch v. Ranibon*, 51 N. W. R., 48.

3808. Service.

Plaintiff went from Iowa to another state, where he engaged in business, with the intention of permanently residing there, his family, however, remaining at his former home in Iowa. *Held*, that his former home ceased to be his place of residence, and that service of notice by leaving a copy there with his wife was not sufficient to give the court jurisdiction: *Schlawig v. De Peyster*, 49 N. W. R., 843.

One who leaves his home as a fugitive from justice, and is absent for a year or more, cannot be regarded as a resident of the home where his wife still resides, so that service can be made upon him by leaving a copy at such place with his wife: *Wolff v. Shenandoah Nat. Bank*, 50 N. W. R., 561.

A substituted service, by leaving a copy with a member of the family, is complete when the notice is properly left, and no time is held necessary to elapse because of the absence of defendant from the county: *Ross v. Hawkeye Ins. Co.*, 50 N. W. R., 47.

3809. Return of personal service.

Sufficiency of return: Where a notice was returned as served by "J. R. Myers, Deputy, J. W. Workman, Sheriff," *held*, that the service appeared to have been made by Myers, as deputy of Workman, sheriff, and was sufficient: *Gray v. Wolf*, 77-630.

Where the return recited service on defendant, who was not found in the county, by delivering to M. H. a true copy at her home and place of residence, it not being shown that M. H. and the person to be served were members of the same family, nor that the copy was left at his usual place of residence, *held*, that the service was wholly insufficient to confer jurisdiction: *Dohms v. Mann*, 76-728.

Evidence: Upon grounds of public policy, the return of the officer, even though not regarded as conclusive, should be deemed strong evidence of the facts as to which the law requires him to certify, and should ordinarily be upheld, unless opposed by clear and satisfactory proof: *Wyland v. Frost*, 75-209.

Where it appears that the return, which is of record, with reference to the date of service is not the return of the officer, and that the official return in that respect is not in existence, it is competent to establish the date of service by parol: *McComb v. Council Bluffs Ins. Co.*, 48 N. W. R., 1038.

Error in name: Where notice was served on N. Young, and it was subsequently claimed that N. S. Young was the defendant in the case, *held*, that the question as to whether N. Young and N. S. Young were the same person was a question for adjudication: *Allison v. Chicago, B. & Q. R. Co.*, 76-209.

Where notice was served by publication on "John Van Nortrick," and it appeared that counsel representing defendant defended the action, *held*, that it would be presumed that such action was defended by a person in interest whose name was "John Van Nortwick," and that the variance between the names was immaterial: *Mallory v. Riggs*, 76-748.

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Where notice was served on two persons designated as assignees of, etc., and the name of one of them was spelled, "Luckenbaugh" instead of "Luckenbach," *held* that, in view of the statement of the representative capacity, the error in name did not prevent the notice from being sufficient to give the court jurisdiction: *Schee v. La Grange*, 78-101.

Under such circumstances, *held*, that the case was not one of no service, but one in which, if erroneous at all, the service was defective only, and the judgment thereunder was not open to collateral attack: *Ibid.*

Where the petition stated the name of defendant as "Edward" L. and the record showed service of notice upon "Edmund" L., *held*, that judgment against "Edmund" L. was not void for want of jurisdiction: *Lindsey v. Delano*, 78-350.

Defective; jurisdiction: If a service of an original notice, which service is in part defective, is shown to have been made, and it appears that the trial court has determined that it is sufficient, its sufficiency cannot be attacked in a collateral proceeding: *Schneitman v. Noble*, 75-120.

Where notice of an application to sell land belonging to a ward was served on the ward three days before the appointment of the guardian, *held*, that the irregularity was not sufficient to affect the jurisdiction of the court: *Hamiel v. Donnelly*, 75-93.

Where the fact of service of notice appears from the decree, it is sufficiently shown by the record, if there is nothing in any other part of the record showing otherwise: *Tolivar v. Morgan*, 75-619.

Notwithstanding a decree recites lawful service of notice the contrary may be shown, and when established in a direct proceeding the judgment will be set aside: *Wolff v. Shenandoah Nat. Bank*, 50 N. W. R., 561.

Where the return did not show either personal service, or sufficient notice by leaving copy, *held*, that the case was not one of defective service, but want of service, and the court acquired no jurisdiction: *Dohms v. Mann*, 76-723.

Service of notice on a local agent in an action not relating to the business of his agency gives the court no jurisdiction: *State Insurance Co. v. Waterhouse*, 78-674.

Where the record in an action against two defendants showed a notice addressed to both of them, with return of service on one, and judgment by default against him, and a judgment against the other at a subsequent term, without any further service, *held*, that there being a conflict in the oral evidence as to whether or not notice was actually served, the lower court correctly found that the judgment against the latter defendant was without notice, and therefore void for want of jurisdiction: *Jamison v. Weaver*, 51 N. W. R., 65.

3815. Service on county; presentation of claim.

This section does not require that a claimant having an unliquidated demand against the county shall produce his evidence in support thereof, but it is enough if the board is informed of the amount of the claim, and the grounds upon which it is made, with sufficient clearness to enable it to investigate the facts and reach an intelligent decision: *Dale v. Webster County*, 76-370.

Where plaintiff presented a claim of five hundred dollars to the board of supervisors for personal injury to his wife caused by a defective bridge, which was refused, and he then brought action for that amount, but afterwards by amendment to his petition claimed a larger amount, on the ground that the injuries were more serious than they were at first suppose to be, *held*, that plaintiff's recovery could not exceed five hundred dollars, as no claim for a larger amount had been presented to the supervisors: *Marsh v. Benton County*, 75-469.

Although the amount to be paid to an attorney selected by the county attorney with the approval of the district court to assist in the prosecution of a criminal case (§ 270) is to be fixed by the board of supervisors, yet their discretion is not absolute, and the attorney is not under obligation to accept the amount allowed, but may resort to the courts to have the amount to which he is entitled determined: *Stone v. Marion County*, 78-14.

The claim for attorney's fees taxed in a liquor prosecution, and which the board of supervisors has directed not to be paid over to the attorney claiming such fees, *held* not to be an unliquidated demand for which claim need be presented as required in this section: *Farr v. Seaward*, 82-221.

A claim against a county for infringement of a patent is such a claim as must be presented under this section, even though it is alleged that there is a fixed amount of royalty uniformly demanded and collected from users of the patented device: *May v. Jackson County*, 35 Fed. R., 710.

3818. Service on agent.

This section does not authorize service upon a general agent, but upon any agent or clerk employed in an office or agency which the defendant may have for the transaction of its business: *Winney v. Sandwich Mfg. Co.*, 50 N. W. R., 565.

If the agency for the prosecution of the business out of which the contract arose is discontinued, and the agent's authority revoked, service of process cannot be made upon such agent, though defendant keeps an agent in the same place for the transaction of other business: *Ibid.*

A local insurance agent is not so employed in the general management of the business of the company that service can be made upon him in a suit against the company relating to a transaction not growing out of the business of his agency: *State Insurance Co. v. Waterhouse*, 78-674.

In a particular case, *held*, that it appeared that defendant maintained in the state such an agency as that service on the agent employed therein might be made with reference to actions growing out of the business of such agency: *Bellows v. Litchfield*, 48 N. W. R., 1062.

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Where service of an original notice was made on an agent, and the sufficiency of the service was questioned, *held* that, as the trial court had determined its sufficiency, it could not be attacked in a collateral proceeding: *Schneitman v. Noble*, 75–120.

3819. Service upon minor.

Where a minor twenty years of age was not served with notice of an action to foreclose a mortgage given by his guardian, *held*, that the court did not acquire jurisdiction of him, and the judgment did not bar his right to question the validity of such mortgage on the ground that it was not approved by the court: *Dohms v. Mann*, 76–728.

3823. Service by publication.

The court acquires jurisdiction by publication only by strict compliance with the requirements of the statute: *Carnes v. Mitchell*, 82–601.

Therefore *held*, that publication without the filing of an affidavit stating that personal service could be made on the defendant within this state was not authorized, and a judgment rendered thereon was void for want of jurisdiction: *Ibid.*; *Chase v. Kaynor*, 78–449.

An action against a non-resident corporation may be maintained in the courts of this state when aided by attachment of property found within the state, and the judgment of a federal court in this state dismissing a former action based on the same cause, but not aided by attachment, is no bar to the subsequent action: *Weyand v. Atchison, T. & S. F. R. Co.*, 75–573.

An action to quiet title is within the provisions of subdivision 6 of this section: *Carnes v. Mitchell*, 82–601.

In a partition suit where the service upon non-resident minors was by publication, and a guardian *ad litem* was appointed who appeared and answered, *held*, that the service of notice was sufficient and the proceedings as to the non-resident minors final and conclusive: *Williams v. Westcott*, 77–332.

Where an attempt was made to substitute a judgment *in rem* for a personal judgment rendered twelve years before, and read and approved and signed by the judge who presided in the court at the time, *held*, that as the defendant in the former proceedings had conveyed his interest in the land, service upon him by publication was not authorized by law: *Cassidy v. Woodward*, 77–354.

In an action to abate a liquor nuisance, a non-resident of the state, who is assignee in bankruptcy, and as such holds title to the lot in question, may be served with notice by publication: *Radford v. Thornell*, 81–709.

A personal judgment rendered against an absconding and non-resident debtor upon service by publication is absolutely void, and a sale of real estate thereunder is unauthorized: *Cassidy v. Woodward*, 77–354.

Judgment on publication in action to quiet title is valid: *Arndt v. Griggs*, 134 U. S., 316.

3827. Actual service outside the state.

Jurisdiction cannot be acquired over non-resident persons by process served without the territorial limits of the state in which the court attempting to exercise jurisdiction is held: *Kelley v. Norwich F. Ins. Co.*, 82–187; *Gary v. Northwestern Masonic Aid Ass'n*, 50 N. W. R., 27.

3828. Service on unknown defendants.

The rule that the verification here referred to is jurisdictional does not apply in other cases where pleadings are directed to be verified: *Guthrie v. Guthrie*, 51 N. W. R., 13.

3829. Form of notice. 2623; 24 G. A., ch. 34. The court, or judge thereof in vacation, shall approve a notice collected from the averments of the petition, which notice shall contain the name of the plaintiff, a description of the property, and all the allegations of the petition concerning the interest of the unknown person, and the mode of devolution thereof, the relief demanded, also the name of the court and the term at which appearance must be made. Said notice must be entitled in the full name of the plaintiff against the unknown claimants of property, and shall be signed by the plaintiff's attorney. [R., § 2837.]

[As amended to authorize approval by judge in vacation.]

3830. Order of publication. 2624; 24 G. A., ch. 34. The court, or judge thereof, on its or his approval of said notice, shall indorse the same thereon, and order that the said notice be published in some newspaper of this state, designating such paper as shall be most likely to give notice to such unknown person. [R., § 2838.]

[As amended to authorize an order by the judge.]

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3832. Appearance; mode; when required.

A party who submits to the jurisdiction of a court by appearing and joining issue on the merits of the controversy thereby waives any objection to such jurisdiction: *German Bank v. American F. Ins. Co.*, 50 N. W. R., 53.

The appearance of a party to a writ of *certiorari* cures any defect in the writ or in the service thereof: *Remey v. Board of Equalization*, 80–470.

Where notice might have been served which would have given the court jurisdiction, an appearance will waive any objection to insufficiency or want of notice: *O'Donnell v. Atchison, T. & S. F. R. Co.*, 49 Fed. R., 689.

Where a non-resident, having been served with notice in the state, but in another county than that in which suit was brought against him, specially appeared in the county in which suit was brought, and asked to have the suit dismissed for want of jurisdiction, *held*, that the court acquired jurisdiction to render judgment in the case: *Marquardt v. Thompson*, 78–158.

Appearance of a person in a suit to which he is not a party for the purpose of securing leave to interplead, which is granted to him, but which leave is not exercised, does not make him a party to the suit in such sense as to bind him by the result of the adjudication: *Carson, etc., Co. v. Knapp, etc., Co.*, 80–617.

3834. Notice to third parties of action affecting real estate.

One who takes an assignment of a note secured by a mortgage on property the title to which is in litigation in a pending action takes subject to the rights of the parties asserted and subsequently established in such action: *Bowman v. Anderson*, 82–210.

Where a decree has been rendered enjoining the use of premises for the illegal sale of intoxicating liquors, a person using such premises for the prohibited purpose is punishable for contempt in violating the injunction, although he was not a party to the proceeding in which the injunction was granted and had no notice thereof: *Silvers v. Traverse*, 82–52.

Without deciding whether the vendor entitled to a lien may bring his action before maturity of the debt, to charge third persons with notice of his lien, the court holds that in a particular case, there being no right to the vendor's lien, the action brought before the maturity of the debt was not maintainable: *Erickson v. Smith*, 79–374.

The filing of a petition for divorce and asking judgment for alimony, and that it be made a lien on defendant's real estate, does not create a lien on particular property, nor is it sufficient to give notice to third parties: *Scott v. Rogers*, 77–483.

Where a party brought an action to have a certain conveyance set aside on the ground that it was fraudulent as to him, and another party intervened claiming that it was also fraudulent as to him, and asking similar relief, *held*, that such a party was a mere interloper whose pleadings were unknown to the law and without legal effect, and one purchasing with knowledge of the attempted intervention could not be held to have had constructive notice of any rights of the party thus intervening: *Des Moines Ins. Co. v. Lent*, 75–522.

Pending a partition suit a party thereto may make a valid conveyance of his interest in the property, or his creditors, by judgment, execution and sale, may invest themselves with whatever right he has; and in the event that partition is found to be impracticable and the premises are sold for the purpose of making division of the proceeds, the purchaser of the undivided share is entitled to the entire amount apportioned to the party whose interest he has bought at execution sale. In order to limit the claim of the creditor to a share in the proceeds equivalent to his claim, it would be necessary to make him a party to the action: *Aplington v. Nash*, 80–488.

The fact that the suit has been talked about will not constitute notice: *France v. Holmes*, 51 N. W. R., 152.

One who takes a lease pending foreclosure proceedings to which lessor is a party is bound thereby: *Stanbrough v. Cook*, 49 N. W. R., 1010.

CHAPTER 7.

JOINDER OF ACTIONS.

3836. When permitted.

An action in equity, and one at law on the same right of action, cannot be maintained together: *National State Bank v. Delahaye*, 82–34.

So *held* where an action was brought to recover a judgment, and also to have a deed set aside and subject the land conveyed thereby to the satisfaction of defendant's debts: *Faivre v. Gillan*, 51 N. W. R., 46.

Plaintiff may join in the same action a claim to recover rent of real estate under an implied contract, and one for the recovery of damages for the wrongful occupation of the same real estate: *Foster v. Hinson*, 76–714.

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CHAPTER 8.

PLEADING.

3842. Time of filing of subsequent pleadings.

An answer to amendments to the petition filed with the argument and before final submission, *held* to be in time: *Kehoe v. Carville*, 51 N. W. R., 166.

A rule of court as to trial notice construed, and *held*, that no trial notice was required as to the appearance term or as to the term at which the issues are first settled: *Erickson v. Barber*, 49 N. W. R., 838.

3845. Motions assailing pleadings; but one motion or demurrer.

A motion should be so presented to the court that its request or a particular request thereof, if it contains more than one, may be sustained or overruled. Therefore where a motion asked that a party state whether a certain agreement referred to was in writing and that he set out a copy of the writing, and the case was not one where it was necessary to set out a copy of such writing if it existed, *held*, that the motion was properly overruled: *National State Bank v. Delahaye*, 82–84.

A second demurrer presenting new grounds of objection must be regarded as a new demurrer and not as an amendment and therefore improper; but *held*, that no objection on that ground having been raised at the time, complaint thereof could not afterwards be made: *Lundbeck v. Pilmair*, 78–434.

Where a second demurrer was interposed, *held*, that costs might be taxed against the demurring party who failed to sustain such second demurrer under the rule of the court allowing taxation of costs in such cases: *Ibid.*

3851. Pleading defined.

The minutes of the testimony taken before the grand jury do not in any sense constitute a pleading; so *held* with reference to the requirements as to filing pleadings: *State v. Craig*, 78–637.

3852. Petition, what to contain.

Incorporation by reference: A petition must be understood as averring the facts disclosed and alleged in the exhibits attached thereto: *Marriage v. Woodruff*, 77–292.

It is not uncommon for a pleading to refer to and incorporate therein portions of the court files by specific averment: *Wishard v. McNeil*, 78–40.

Allegations of negligence: Under the rule prevailing in this state, plaintiff seeking to recover for personal injuries by reason of a defective sidewalk is required to allege and prove that he is free from contributory negligence with reference to the injury received: *Fernbach v. Waterloo*, 76–598.

Where the petition in an action for personal injury to a passenger alleged that such injury resulted from the careless running of defendant's engine, *held* that, in the absence of motion for more specific statement, plaintiff was properly permitted to prove that failure to sound the whistle or ring the bell contributed to plaintiff's injury: *Winter v. Central Iowa R. Co.*, 80–443.

Where in an action to recover for injuries received by a railroad employee by reason of the alleged defect of a car, *held*, that a general averment of negligence in the use of such car was sufficient, in the absence of an omission to make the petition more specific, as to the negligence complained of: *O'Connor v. Illinois Cent. R. Co.*, 48 N. W. R., 1002.

In an action for injuries by reason of being run over by defendant at a crossing, *held*, that variance as to the direction in which defendant was going at the time of the accident was immaterial: *Robbins v. Diggins*, 78–521.

Estoppel: Where no estoppel is pleaded, it is reversible error to instruct the jury that they may find for the plaintiff on the ground that an estoppel has been proven: *Eggleston v. Mason*, 51 N. W. R., 1.

Breach of contract: In a particular case, *held*, that a petition which set out a contract, alleged a breach thereof and that damage resulted therefrom, and asked a judgment on that account, was in an action on contract, and that certain other allegations coupled therewith, which in themselves stated what would be a cause of action in tort, not being made the basis for recovery, but for pleading a settlement, did not constitute a second cause of action: *Strauss v. Shaw*, 50 N. W. R., 1060.

Performance: In an action for mechanic's lien, *held*, that the performance of the contract under which the plaintiff claimed was sufficiently averred, in the absence of motion for more specific statement: *Bangs v. Berg*, 82–850.

Allegations and proof; variance: In an action to recover borrowed money, evidence which tends to show liability for failure to pay a draft drawn upon defendant is incompetent and immaterial, not being relevant to the issue made in the pleadings: *Groneweg v. Kusworm*, 75–237.

Where action is brought for the destruction of hay of plaintiff, due to fire set out by a railway company in the operation of its engine, but no particular negligence is stated, it is competent for plaintiff to prove any kind of negligence in the operation of such engine causing the injury. It might be otherwise, if the particular kind of negligence were alleged: *Bulliss v. Chicago, M. & St. P. R. Co.*, 76–680.

Discrepancies between the transcript of a judgment set out in a petition as the basis of

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the cause of action, and in the transcript of such judgment offered in evidence, *held* immaterial: *Rea v. Scully*, 76–343.

Where a petition alleged a promise to pay certain items of an account, and there was no evidence to sustain the allegations, *held*, that no prejudice could have resulted to defendant from a statement in an instruction that plaintiff's claim was based upon a special promise, as no verdict was returned for plaintiff upon those items of the claim: *Ressler v. Baxley*, 81–750.

Where in an action against the Dubuque & Sioux City Railroad Company it was alleged that the "Sioux City & Dubuque Railroad Company" assumed the obligation on which action was brought, *held*, that the discrepancy was only a clerical error and would not defeat recovery: *Knott v. Dubuque & S. C. R. Co.*, 51 N. W. R., 57.

Where a petition alleged an absolute sale of goods, and the evidence showed that the sale was conditional, but because of the failure of the condition it had become an absolute sale for which the vendees were liable, *held*, that the allegations of the original petition were sufficiently broad to allow a recovery on the evidence submitted: *George v. Swafford*, 75–491.

Recovery: A judgment for a greater amount than is claimed in the petition is not authorized, and plaintiff should not be permitted to amend his petition after judgment is rendered, claiming damages greater than were alleged in the original petition: *Cox v. Burlington & W. R. Co.*, 77–478.

The amount in controversy is the amount claimed and which may be recovered in the action: *McVey v. Johnson*, 75–165.

Under an allegation of damage to plaintiff's land for the wrongful diversion of surface water and its discharge upon such land, plaintiff may recover for the deposit of earth, clay and other materials upon the land by such overflow, although not specially pleaded: *Hunt v. Iowa Cent. R. Co.*, 52 N. W. R., 668.

Where the relief granted is consistent with the case made by the petition and embraced in the issues presented by the pleadings, it cannot be complained of as greater than the relief demanded: *Johnson v. Ridir*, 50 N. W. R., 36.

In an action on account stated, *held*, that the amount alleged in the petition was balance due on the account stated after payments and not the amount found due by the settlement: *Thompson v. Smith*, 82–598.

Allegation of non-payment: Where in an action for damages on an attachment bond it was not averred that damages were unpaid, but the question of the liability of defendant to damages was contested on the trial, no objection being made on account of the want of such averment, *held*, that such objection would not be considered on appeal: *Knapp & Spalding Co. v. Barnard*, 78–347.

Prayer: A mere clerical error which was immaterial under the other averments of the petition and the prayer for judgment, *held* properly disregarded by the court and jury: *Fleming v. Stearns*, 79–256.

Under a general prayer for relief in a petition in equity plaintiff may be awarded any remedy afforded by the law for the particular wrong complained of: *Thomas v. Farley Mfg. Co.*, 76–735.

In a general prayer for relief in an equitable action plaintiff is entitled to judgment for costs, although no such judgment is specially prayed for: *Searle v. Fairbanks*, 80–307.

In an action to quiet title and for general relief the court may give plaintiff a money judgment, if that appears to be the relief to which he is entitled: *Iler v. Griswold*, 49 N. W. R., 1023.

Election: Where a plaintiff brought an action at law upon a promissory note and subsequently filed an amended and supplemental petition asking equitable relief, *held*, that plaintiff could not rely on both statements of his cause of action at the same time and must elect between them: *National State Bank v. Delahaye*, 82–34.

Counts: Where each count of a petition contained two causes of action and defendant failed to object to the same, *held*, that both causes of action in each count were properly submitted to the jury: *Joy v. Bitzer*, 77–73.

The same cause of action may be stated in different counts of the petition: *Sadler v. Olmstead*, 79–121.

Therefore, where plaintiff sought to recover in one count on contract and in another on arbitration and award, for the same thing, *held*, that the first count was not a waiver of the award: *Ibid.*

Where two counts of a petition were much the same in legal effect, *held*, that no prejudice could have resulted from overruling a motion to require plaintiff to elect the count upon which it would proceed and to strike the other from the petition: *Taylor County v. Stanley*, 79–666.

A written or oral promise to pay money in consideration of damages due for a wrongful act, and the promise implied by law to pay the damages growing out of such wrongful act considered as a tort, are separate causes of action and must be pleaded, if relied on in the same action, in separate counts: *Aultman v. Goldsmith*, 51 N. W. R., 43.

Where the facts were set up in one count, *held*, that it would be deemed a cause of action on the contract set out, and not on an implied promise growing out of the acts as constituting a tort: *Ibid.*

Divisions: Where a petition contains several causes of action, but is not separated into divisions, a demurrer to one cause of action may be sustained, and the plaintiff cannot urge the defects in his pleading to defeat the demurrer: *Burhans v. Squires*, 75–59.

3854. Demurrer; causes of.

Ruling not conclusive: A ruling upon demurrer is not conclusive upon the court as to the same question arising subsequently in the case: *Richman v. Supervisors of Muscatine County*, 77–518; *Brown v. Cunningham*, 82–512.

Motion: Where a motion to strike is allowed, without objection of the opposite

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party, to have the effect of a demurrer, complaint cannot be made of the ruling in excluding the matter objected to, where it would have been adjudged insufficient on demurrer: *Chase v. Kaynor*, 78-449.

Relief demanded: Under a general prayer in a petition in equity, the plaintiff may be awarded any remedy afforded by the law for the particular injury or wrong complained of, and such a petition is not open to demurrer on the ground that the facts stated do not entitle the plaintiff to the relief demanded, if there is any relief that may be granted under the facts alleged in the petition: *Thomas v. Farley Mfg. Co.*, 76-735.

Limitation: It will be presumed that parties to actions are citizens of the state, and that the cause of action arose in the state, unless the contrary appears; and where the petition shows nothing as to these facts, but shows that the cause of action is otherwise barred by the statute of limitations, a demurrer to the petition should be sustained: *Van Patten v. Bedow*, 75-589.

Setting out copy: Where defendant alleged payment by an agreement with plaintiff by which certain property was taken in satisfaction of plaintiff's claim, *held*, that even if such contract were in writing, it was not such a contract as defendant could be required to set out in his pleading: *National State Bank v. Delahaye*, 82-34.

Misjoinder: The fact that persons are joined with plaintiff who have no interest in the action is not a ground of demurrer: *Grayson v. Willoughby*, 78-83.

Divisions: Where a petition is not separated into divisions, but contains several causes of action, a demurrer may be sustained to one of them: *Burhans v. Squires*, 75-59.

Other pleadings: Where a substituted pleading is filed the original cannot be considered in ruling on a demurrer attacking the substitute: *State v. Simpkins*, 77-676.

Admissions: A demurrer does not admit conclusions. In determining what is admitted all the pleadings should be considered: *State ex rel. v. Nichols*, 78-747.

3856. Waiver of objection; answer; arrest of judgment.

What constitutes waiver: When the grounds of the objection appear on the face of the petition it cannot be made by answer. The meaning of the section is that if the objection be not taken by demurrer when that is the proper mode, or by answer when that is proper, it is waived, and in either event the objection cannot be raised by motion for a new trial. Such motion cannot be deemed equivalent to a motion in arrest of judgment: *Linden v. Green*, 81-365.

Where defects are apparent on the face of a pleading, if they are not assailed by demurrer they are waived: *Dunn v. Wolf*, 81-688.

Failure to demur to an answer, on the ground that the facts stated do not constitute a defense, will be a waiver of such objection: *Benjamin v. Vieth*, 80-149.

A party who fails to demur to the petition cannot by allegations of the answer, not setting up defensive matter, put in issue the sufficiency of the petition: *Wing v. District T'p*, 82-632.

Where in an action to recover damages on an attachment bond it is not alleged that the damages are unpaid, but the case is tried on the question as to the liability under the bond, no objection having been made on account of failure to plead non-payment of damages, such objection will be deemed waived by not having presented it by demurrer: *Knapp & Spalding Co. v. Barnard*, 78-347.

An objection to a petition that it does not allege a material fact, which is not taken by demurrer or answer, is deemed waived: *Lynn v. Morse*, 76-665.

After the filing of a reply by plaintiff the sufficiency of the facts pleaded by defendant as a defense cannot properly be raised: *Carson, etc., Co. v. Knapp, etc., Co.*, 80-617.

Where an objection to a petition appearing on the face thereof is not raised by demurrer or motion in arrest of judgment, it is deemed waived and cannot be raised on a motion for a new trial: *Brockert v. Central Iowa R. Co.*, 82-369.

Where a petition on a contract for breach of promise of marriage was not attacked by demurrer, *held*, that the objection that it was void by reason of conditions contained in the contract appearing from the face of the petition could not be made the ground of objection to the admission of evidence: *McConahey v. Griffey*, 82-564.

Where the answer set up facts as constituting an estoppel, which facts were established by the evidence, *held*, that the effect of such defense could not be defeated on the ground that the facts did not constitute an estoppel, the sufficiency of such facts in law for that purpose not having been raised by demurrer nor by motion in arrest of judgment: *Arndt v. Hasford*, 82-499.

Where the opposite party attacks a pleading by motion which is overruled, and then demurs thereto, the ground of the motion will be deemed waived, even though it is repeated in the demurrer, providing the motion was the proper method of raising the objection relied upon: *Nieukirk v. Nieukirk*, 51 N. W. R., 10.

In an action for an injunction, the fact that the petition does not allege that the threatened injury is irreparable, nor that the defendant is insolvent, is waived by failing to demur on that account: *Price v. Baldauf*, 82-669.

Instructions: It is not proper by instructions to raise objections which might have been raised by motion or demurrer, but which have been waived by failure to make such objection: *Wimer v. Allbaugh*, 78-79.

By failing to take advantage of grounds of demurrer to the petition, the defendant waives objection thereto, and is not entitled to have the court direct a verdict for him on such grounds: *Dodge v. Davis*, 52 N. W. R., 2.

Motion in arrest: A correct test of the sufficiency of the petition to entitle plaintiff to any relief is to admit the facts pleaded, and to determine the law applicable thereto, and the want of an allegation, which if made would only make the petition more specific, will not be ground for arresting judgment: *O'Conner v. Illinois Cent. R. Co.*, 48 N. W. R., 1002.

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The fact that allowance has been made of a claim pleaded as a counter-claim, but which, while constituting a cause of action in favor of defendant against plaintiff, could not properly be set up as a counter-claim, cannot be made a ground for an arrest of judgment, where no objections were made before the trial: *Mitchell v. Joyce*, 76-449.

If the allegations of the petition are supported by proof, but nevertheless do not constitute a cause of action, the court may instruct the jury that the plaintiff cannot recover. It is not the rule that when a demurrer has been overruled and defendant has answered, judgment must be rendered for plaintiff, if the proof sustains the allegations of his petition, even though no legal liability is shown: *Brown v. Cunningham*, 82-512.

Where the facts stated in the petition entitle the plaintiff to some relief, a motion in arrest of judgment will not lie: *Johnson v. Miller*, 82-693.

Defect in the verification of a pleading cannot be made a ground for an arrest of judgment: *Turner v. Younker*, 76-255.

On appeal: Where defendant answered the petition, went to trial and introduced his evidence, and did not attack the sufficiency of the petition either before or after the verdict, *held*, that he could not object to it upon appeal: *Martyn v. Lamar*, 75-235.

In order to have the ruling on a demurrer reviewed upon appeal, it is not sufficient to note a general exception at the end of the decree to all of the rulings set out in the decree, but the party excepting must have the record show an election to stand on the demurrer: *Stanbrough v. Daniels*, 77-561.

Where the petition in an action for fraud does not allege that the party knew the statements constituting the fraud, and without objection on that ground the defendant proceeds to trial, he cannot afterwards raise such objection for the first time on appeal: *Mann v. Taylor*, 78-355.

3860. Failure to amend or plead over.

This section does not provide when and how the amendment may be made to prevent judgment following upon the ruling on the demurrer. That is a matter within the discretion of the court: *Rosenbaum v. Council Bluffs Ins. Co.*, 37 Fed. R., 7.

Where a motion for a more specific statement is overruled, defendant, by pleading over, waives any error in such ruling: *Ida County v. Woods*, 79-148.

By amending his pleading after a demurrer has been sustained, a party waives any objection which he might have to the ruling on the demurrer: *Brown v. McMahon*, 80-191; *Scholl v. Bradstreet*, 52 N. W. R., 500.

Where defendant demurred to plaintiff's petition and the demurrer was overruled, and, without objection to the ruling on demurrer, defendant answered, *held*, that he thereby waived objection, and by taking issue on the allegations admitted the sufficiency of the petition: *Allen v. Pratt*, 79-113.

Where a motion to make a petition more specific is overruled and defendant answers, he thereby waives any error in overruling the motion: *Randolf v. Bloomfield*, 77-50.

Where a motion to strike irrelevant and redundant matter from a petition is overruled, the defendant, by proceeding to trial, does not thereby waive his right to object to such matter on the trial as surplusage, and the overruling of such motion will therefore be error without prejudice: *Ida County v. Woods*, 79-148.

Any error in motions to strike a petition from the files or strike out parts thereof, or make the same more specific, is waived by answering and going to trial: *Mann v. Taylor*, 78-355.

Where a party sought to maintain a right to recover in law, and also to recover in equity in the same action, and his petition in equity was on motion stricken out, *held*, that by proceeding to trial on the petition at law, he waived objection to the action of the court with reference to the other petition: *National State Bank v. Delahaye*, 82-34.

3861. Answer, what to contain.

Conclusions: An allegation in an answer which simply states a conclusion drawn from facts not pleaded does not raise an issue: *Hintrager v. Richter*, 52 N. W. R., 188.

An allegation that notes were not indorsed so as to transfer the title, *held* not to be a denial of the transfer nor of the act of indorsement, but a mere conclusion of law not sufficient to raise an issue as to the validity of the indorsement: *Second Nat. Bank v. Martin*, 82-442.

Where a denial is not unqualified but is based upon facts alleged in the answer, then, if such facts do not controvert the allegations of the opposite pleading, such pleading cannot be deemed denied: *State v. Iowa Cent. R. Co.*, 50 N. W. R., 280.

Denial: An answer denying each and every allegation of the petition "not hereinafter expressly admitted" is sufficient: *Hintrager v. Richter*, 52 N. W. R., 188.

In a particular case, *held*, that an answer was not in effect either a denial of matter pleaded nor a denial of knowledge or information of such matter: *Blane v. Tharp*, 49 N. W. R., 1044.

Where, in an action against a railroad company for killing seven animals, defendant admitted the killing of six of them, and pleaded a tender of the value thereof, and also interposed a general denial, *held*, that the general denial should be limited to the facts relating to the liability for the seventh animal: *Taylor v. Chicago, St. P. & K. C. R. Co.*, 76-753.

In an action for damages for seduction, the plaintiff alleged non-payment, and defendant interposed a general denial. *Held*, that failure of plaintiff to introduce direct evidence of non-payment would not be ground for reversal of judgment for plaintiff, the case evidently having been tried on the theory that plaintiff's

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demand always had been resisted: *Egan v. Murray*, 80–180.

Admissions: Where plaintiff sought to recover under a contract in one count of the petition, and in another sought to recover the amount due on an award upon submission to arbitration, and where defendant admitted the award, *held*, that this was an admission of the agreement to submit the matter to arbitration: *Sadler v. Olmstead*, 79–121.

Negligence: Where the party whom it is sought to hold for negligence desires to rely upon negligence of the opposite party in avoidance, such negligence should be pleaded: *First Nat. Bank v. O'Connell*, 51 N. W. R., 162.

Defense not pleaded: Where an answer by its terms excludes from the defense matters not pleaded, the defendant cannot complain when the matters excluded are withheld from the jury: *Pelley v. Walker*, 79–142.

The defense of breach of warranty in an action on a contract of sale is an affirmative one, and must be pleaded: *Bradley v. Palen*, 78–126.

A complete accord and satisfaction is to be pleaded by way of defense and not raised by motion to dismiss the action: *George v. Chicago, F. M. & D. M. R. Co.*, 52 N. W. R., 512.

Grounds of demurrer: A party cannot by allegations of his answer raise objections which might have been but were not raised by demurrer to the petition: *Wing v. District T'p*, 82–632.

Counter-claim: A counter-claim is an answer, and where the petition is verified an answer setting up a counter-claim must be verified in the same way as any other answer: *Yarger v. Chicago, M. & St. P. R. Co.*, 78–650.

3863. Divisions of answer.

Where the second part of the answer contained a denial of all allegations not admitted therein, *held*, that such denial had reference to admissions in the first division of the answer, and that the two were not to be taken as setting up distinct and inconsistent defenses, but to be construed together as setting up one defense: *Comes v. Chicago, M. & St. P. R. Co.*, 78–391.

3865. Counter-claim.

What constitutes: The three subdivisions of this section are in substance the same as the three sections of the Revision of 1860 relating to set-off, counter-claim and cross-demand: *Sherman v. Hale*, 76–383.

A cause of action arising on contract in behalf of one of two or more defendants may be pleaded as a counter-claim in an action founded on contract: *Ibid.*

The statutory counter-claim includes matters of recoupment and of set-off, and any new matter constituting a cause of action in favor of the defendant against the plaintiff, and owned by the defendant when the suit was brought, may be set up: *Welles v. Stout*, 38 Fed. R., 807.

Where a principal and surety are sued jointly on a promissory note or contract, they are entitled to plead as a counter-claim a cause of action arising in favor of the principal alone out of matters independent of the contract sued on; but where the cause of action is in favor of the surety alone, it cannot be pleaded as a counter-claim: *Corbett v. Hughes*, 75–281.

In an action on a debt secured by a pledge, the pledgor may by counter-claim set up wrongful acts of the pledgee as to the pledged property: *First Nat. Bank v. O'Connell*, 51 N. W. R., 162.

Where plaintiff had recovered a judgment in one case which she was entitled to set off against her notes in another case, *held*, that the costs included in the judgment should be considered a part of the set-off: *Otcheck v. Hostetter*, 77–509.

Where affirmative matter was pleaded in an answer to a petition designed as a defense to plaintiff's claims, *held*, that such averments in the answer could not be regarded as a counter-claim, as a decree in favor of defendants on the allegations of the petition would have given them all the relief they could have obtained on the averments of their answer: *Deere v. Wolf*, 77–115.

Where in an action to quiet title defendant set up the payment of taxes by way of defense, but did not ask any affirmative relief on that account, *held*, that the court should not direct a repayment to him of such taxes, but leave the matter for subsequent adjudication: *American Emigrant Co. v. Fuller*, 50 N. W. R., 48.

Where in an action of replevin defendant sought equitable relief with reference to the subject-matter of the action, but the parties, and the subject-matter, and the judgment sought, were all such that the relief asked could not be obtained under a merely defensive plea, *held*, that the claim for such relief constituted a counter-claim, and could not therefore be interposed in such action: *Muir v. Miller*, 82–700.

A cross-petition is in both name and substance something more than a defensive plea. It presents a cross-demand, which under this section is a counter-claim: *Ibid.*

Objection waived: Where the allegations of a counter-claim show an indebtedness from plaintiff to defendant, but not an indebtedness which can properly be made the subject of a counter-claim, and no demurrer or other objection is interposed before the trial, the plaintiff cannot afterwards have an allowance by the jury of the amount claimed by defendant disregarded on motion: *Mitchell v. Joyce*, 76–449.

Form of trial: While it is provided (§ 3722) that an equitable issue arising in an action properly commenced by ordinary proceedings may be tried in the manner prescribed for the trial of equitable proceedings, there is no such provision with reference to issues of law arising in cases properly commenced by equitable proceedings, and therefore, where defendant by a counter-claim raises an issue at law in an equitable action, he is not entitled to a jury trial thereof: *Ryman v. Lynch*, 76–587.

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Verification: An answer setting up a counter-claim must be verified if the petition is verified: *Yarger v. Chicago, M. & St. P. R. Co.*, 78–650.

As to whether a counter-claim may be interposed in proceedings to enforce payment of claims due to an estate, see notes to § 3566.

3869. Cross-petition.

A junior mortgagee whose mortgage covers premises which are also covered by a senior mortgage may by cross-petition in an action to foreclose such senior mortgage ask relief against a party who has obligated himself to pay such senior mortgage for his protection: *Montpelier Savings Bank v. Arnold*, 81–158.

Where a cross-petition is filed the plaintiff may interpose any defense to defendant's action which he could have pleaded had defendant first brought action: *Willard v. Wright*, 81–714.

Where plaintiff appears to and answers a cross-petition he cannot afterward complain of want of notice: *Russell v. Lamb*, 82–558.

The term cross-bill is often used as synonymous with cross-petition, as here described: *Ibid.*

In a particular case, *held*, that the cause of action set up by defendant in his cross-petition did not affect the subject-matter of plaintiff's action in such way as to render the cross-petition proper: *Mahaska County State Bank v. Christ*, 82–56.

3870. Demurrer to answer.

The sufficiency of a defense pleaded in an answer should be raised by demurrer to the answer, and not by motion to strike the answer from the files: *Walker v. Pumphrey*, 82–487.

3871. Reply, when necessary.

A reply is not necessary to put in issue new matter of avoidance set up in the answer: *Hartley v. Keokuk & N. W. R. Co.*, 52 N. W. R., 352.

Affirmative facts pleaded in defense are not to be taken as true on failure to reply thereto: *Chase v. Kaynor*, 78–449.

Where in an action for breach of contract defendant pleaded minority and the rescission of the contract because thereof, and the reply did not deny the fact of minority or rescission, but stated facts in avoidance, *held*, that minority and rescission were thereby admitted: *Harrison v. Burns*, 51 N. W. R., 165.

Where in connection with an allegation by way of avoidance the reply contains a general denial, the matter in the answer which is sought to be avoided will not be deemed to be admitted: *McDermott v. Iowa Falls & S. C. R. Co.*, 52 N. W. R., 181; *Stanbrough v. Daniels*, 77–561.

Matter in avoidance of the plea of the statute of limitations cannot be shown without having been set out in reply: *Willits v. Chicago, B. & K. C. R. Co.*, 80–581.

3872. Statements of reply.

An objection that averments of the reply are inconsistent with those of the petition cannot be made for the first time in the supreme court on appeal: *Adams County v. Hunter*, 78–328.

3875. Verification of pleadings.

Where the petition is verified defendant must verify his answer setting up a counter-claim: *Yarger v. Chicago, M. & St. P. R. Co.*, 78–650.

3878. Verification by agent or attorney.

The requirements of this section are not applicable to the verification of a petition for attachment as provided for in § 4165. Under that section it is not necessary that a verification by plaintiff's attorney shall show that he had knowledge of the statements contained in the petition: *Sioux Valley State Bank v. Kellog*, 81–124.

3880. Verification of counter-claim.

An answer setting up a counter-claim must be verified if the petition is verified: *Yarger v. Chicago, M. & St. P. R. Co.*, 78–650.

3883. Effect of failure to verify.

An unverified petition is not to be treated as a nullity: *Guthrie v. Guthrie*, 51 N. W. R., 18.

Objections that a pleading is not verified cannot be raised by instructions to the jury or motion in arrest of judgment: *Turner v. Younker*, 76–258.

3888. Matter in mitigation.

Evidence by defendant of matters not pleaded as justification or mitigation is not admissible: *Halley v. Gregg*, 82–622.

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3889. Intervention.

An intervention is secured by petition and not by motion: *Dullard v. Phelan*, 50 N. W. R., 204.

In a proceeding by *certiorari* by a taxpayer of the county to have an action of the board of supervisors, by which the salary of the county attorney was increased, set aside, *held*, that the county attorney was a necessary party, and the court did not err in allowing him to intervene, although the cause had been determined, as the granting of the application did not cause any delay in the final decision of the cause: *Goetzman v. Whitaker*, 81–527.

One who attempts to intervene between other parties without bringing himself within the provisions of this statute is a mere interloper, who acquires no rights by his unauthorized interference, unless objection thereto is waived. His pleadings are unknown to the law and can have no legal effect: *Des Moines Ins. Co. v. Lent*, 75–522.

Where a party intervened in an action in which it was sought to recover damages against a railway company for maintaining its track over the streets of a city without paying damages to abutting property owners and to enjoin the company from operating its railway, and the suit was determined on the petition of intervention without regard to the application for an injunction, *held*, that such decision did not bar a subsequent suit by the intervenor for an injunction: *Harbach v. Des Moines & K. C. R. Co.*, 80–593.

The right of an intervenor to dismiss his petition of intervention at any time before judgment is well settled, and he will not by such dismissal be estopped from at any time litigating the same matter: *Woodward v. Jackson*, 52 N. W. R., 358.

3892. Variance, how cured.

An amendment to conform the pleadings to the proofs by introducing allegations of a material fact which is shown by the evidence may be made after verdict and judgment: *Davis v. Chicago, R. I. & P. R. Co.*, 49 N. W. R., 77.

Variance as to circumstances surrounding the negligence complained of as a cause of action, *held* immaterial: *Robbins v. Diggins*, 78–521.

As to what discrepancy between allegation and proof is to be deemed a variance, see notes to § 3852.

3895. Amendment, when allowed.

What proper: It is the rule to allow amendments, and to deny the right is the exception: *Newman v. Covenant Ins. Ass'n*, 76–56.

Where an action was brought against a mutual benefit association on a certificate, and it was held on appeal that plaintiff was not entitled to a money judgment, but only to the proceeds of an assessment according to the rules of the company, and the judgment against the company was therefore reversed and the cause remanded, *held*, that the plaintiff might thereupon amend his petition so as to ask for the assessment, although the time within which such an assessment might have been demanded in the original action had already expired: *Ibid.*

The right to make amendments by which cases are changed from the law to the equity jurisdiction of the court has been too long recognized in practice to be now called in question: *Ibid.*

The language of this section is such as to induce a liberal construction that the spirit of the legislation may be preserved. And *held*, that a cause of action under a contract in a different form from that stated in the original petition was proper: *Williamson v. Chicago, R. I. & P. R. Co.*, 51 N. W. R., 60.

The law as to amendments is designed to permit the parties, sooner or later, to plead the actual facts: *Ibid.*

It is within the discretion of the court to permit a material amendment to be made to the pleadings at any time, and where such amendment is made and the allegations contained therein are not denied by subsequent pleading, they will be regarded as admitted: *Eslich v. Mason City & Ft. D. R. Co.*, 75–443.

Where an amendment merely sets out more fully what has already been alleged in a previous pleading, objection cannot be maintained to the filing, but the party, if prejudiced thereby, must ask for additional time: *Hintrager v. Richter*, 52 N. W. R., 188.

An amendment to the petition adapting the prayer to the allegations of fact may be properly allowed: *Cook v. Chicago, R. I. & P. R. Co.*, 75–169.

Changing from law to equity: A party is not estopped, by bringing an action at law, from amending his pleadings before the case has finally been submitted to the court, so as to change it into an action in equity: *Barnes v. Hekla F. Ins. Co.*, 75–11.

So *held* in an action on a policy of insurance as to an amendment asking a reformation of the policy: *Esch v. Home Ins. Co.*, 78–334.

It is proper to allow the filing of an amendment raising equitable issues, and in the meantime stay the action at law: *Rosenbaum v. Council Bluffs Ins. Co.*, 37 Fed. R., 7.

After trial: Amendments to pleadings are frequently allowed after the evidence has been fully submitted, in the furtherance of justice; and *held*, that it was not ground for reversal to refuse to strike out an amendment filed after the trial of an action before a referee, and before a decision thereon, no prejudice to the opposite party appearing: *Crismon v. Deck*, 51 N. W. R., 55.

To conform pleadings to evidence: An amendment may be allowed, to make the pleading conform to the facts proved, after the evidence is all in and after opening arguments have been made: *Larkin v. McManus*, 81–723.

An amendment to conform the pleadings to

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the proofs by introducing an allegation of a material fact which is shown by the evidence may be made, even after verdict and judgment: *Davis v. Chicago, R. I. & P. R. Co.*, 49 N. W. R., 77.

Held not error, after the introduction of plaintiff's evidence, to allow plaintiff to file an amended petition, not changing the plaintiff's claim, but setting out more fully the form and substance of the contract sued on; and *held*, that in such case there was no ground for a continuance: *Marsh v. Chicago, R. I. & P. R. Co.*, 79–332.

What not allowed: A judgment for a greater amount than is claimed in the petition is not authorized, and plaintiff should not be permitted to amend his petition after judgment is rendered, claiming damages greater than were alleged in the original petition: *Cox v. Burlington & W. R. Co.*, 77–478.

Where the allegations of an amendment filed after the verdict was returned were such as to affect the rights of the parties, the amendment was properly stricken from the files by the court on its own motion: *Toledo Savings Bank v. Rathmann*, 78–288.

Where in an action at law upon a promissory note plaintiff filed an amended and supplemental petition asking equitable relief, *held*, that he could not maintain both causes of action on the same right of recovery and could be required to elect between them: *National State Bank v. Delahaye*, 82–34.

In an action for libel, *held*, that the amendment to the answer pleading other words spoken and written, constituting a wholly new transaction, was properly stricken out on motion: *Halley v. Gregg*, 82–622.

It is not error to refuse leave to file an amended pleading after judgment, which is not intended to conform the allegations to the proofs, but to set up a new defense: *McNider v. Sirrine*, 50 N. W. R., 200.

In an action brought to restrain a road supervisor from making certain proposed changes in a public street in front of plaintiff's premises, *held*, that the court properly refused to allow an amendment setting up a cause of action against the road supervisor and his sureties on his bond for damages by reason of having done the acts which were sought to be restrained: *Randall v. Christianson*, 51 N. W. R., 253.

Striking from files: The court is vested with a sound discretion as to striking an amendment from the files: *Wyland v. Mendel*, 78–739.

Continuance: As to when an amendment will be ground for continuance, see notes to § 3897.

Original pleading: Where a substituted pleading is filed in an action, the original pleading cannot be considered in a demurrer attacking the one substituted: *State v. Simpkins*, 77–676.

Amendment withdrawn: It is not proper for counsel in argument to comment upon an amended pleading which has been withdrawn: *Riley v. Iowa Falls*, 50 N. W. R., 83.

3897. Continuance on account of amendment.

An application for a continuance to prepare an answer to an amendment to make the pleading conform to the proofs is properly denied, where it appears that the amendment is not material, and that the cause has been tried from the beginning on the theory disclosed by the amendment: *George v. Swafford*, 75–491.

If no continuance is asked on account of an amendment, complaint cannot afterwards be made that time was not granted: *Wyland v. Mendel*, 78–739.

3899. Interrogatories annexed to pleadings.

The party filing the interrogatories has the right to have them answered by the person to whom they are addressed, and the person to whom they are addressed cannot substitute answers made by another, and thus make such other person the witness in the case: *Gollsbitsch v. Ranibon*, 51 N. W. R., 48.

3909. Allegations of place.

It is unnecessary in a replevin suit to allege the place where the property is detained by defendant: *Kelley v. Cosgrove*, 48 N. W. R., 979.

3910. Evidence admissible under denial.

Under a denial by operation of law of the allegations of an affirmative defense, the only proofs admissible are such as would negative the affirmative averments of the answer: *First Nat. Bank v. Wright*, 48 N. W. R., 91. (On rehearing, 50 N. W. R., 23.)

Where plaintiff sought to recover for injuries received by reason of the defective condition of a sidewalk, due to the negligence of the city, *held*, that evidence that plaintiff was at the time intoxicated was admissible on the part of defendant, it being obligatory upon the plaintiff to prove freedom from contributory negligence, and the evidence referred to having a tendency to show the existence of such negligence: *Fernbach v. Waterloo*, 76–598.

And see, in general, notes to § 3861.

3916. Inconsistent defenses.

In case of a plea of tender and also a general denial, the plea of tender overrides and controls the denial although they are in separate counts: *Taylor v. Chicago, St. P. & K. C. R. Co.*, 76–753.

3917. Pleading exceptions.

Section applied: *Winney v. Sandwich Mfg. Co.*, 50 N. W. R., 565.

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3918. What deemed admitted.

Facts alleged in the petition and not denied are deemed admitted: *Pierce v. Herrold*, 49 N. W. R., 1042.

This rule is applicable in a special proceeding: *Van Aken v. Welch*, 80–114.

Where an amendment is made to a pleading which contains a material allegation, if such allegation is not denied by subsequent pleading it will be regarded as admitted: *Eslich v. Mason City & Ft. D. R. Co.*, 75–443.

Where plaintiff pleaded breach of contract and defendant denied the breach and set up minority and rescission, and plaintiff pleaded in avoidance without denying the allegations of the answer, *held*, that the burden of proof was upon plaintiff to establish the breach of the contract and the truth of the matter pleaded by way of avoidance in his reply: *Harrison v. Burns*, 51 N. W. R., 165.

Under the denial implied by law of the allegations of the answer showing failure of consideration for the note sued on, *held*, that plaintiff could not show facts constituting a waiver of such failure of consideration: *First Nat. Bank v. Wright*, 48 N. W. R., 91. (On rehearing, 50 N. W. R., 23.)

Where a matter is set up by way of cross-bill, which is a part of the transaction and proper to be considered if no counter-claim had been pleaded, the failure to deny such matter in the reply will not be an admission of the truth of the allegation: *Brown v. Barngrover*, 82–204.

3921. Judgment, how pleaded.

In this state it is not necessary in pleading a judgment to state the facts conferring jurisdiction, but it is sufficient to state that the judgment was duly rendered: *American Emigrant Co. v. Fuller*, 50 N. W. R., 48.

3924. Defenses to be specially pleaded.

Facts showing want of corporate capacity cannot be relied on, if not specifically stated in the answer: *Warder, etc., Co. v. Jack*, 82–435.

In an action on a policy of insurance, containing a condition that notice of loss must be given, and proofs of loss furnished, as a condition to recovery thereunder, *held*, in the absence of anything in defendant's answer raising an issue as to the sufficiency of the notice and proofs of loss, there was no necessity of introducing evidence of the contents of either: *Hagan v. Merchants', etc., Ins. Co.*, 81–321.

In order to put in issue the validity of a judgment, it is not sufficient to deny that the judgment was duly rendered, but the facts relied on must be specifically stated: *American Emigrant Co. v. Fuller*, 50 N. W. R., 48.

3926. Irrelevant and redundant matter; striking out.

A motion to strike a pleading from the files is not a proper method of assailing such pleading on account of containing irrelevant, immaterial and redundant matter: *Walker v. Pumphrey*, 82–487.

It will not be error to refuse to strike from the petition averments which cannot result in prejudice to the opposite party: *Bangs v. Berg*, 82–350.

Where a motion to strike is allowed without objection of the opposite party to have the effect of a demurrer, complaint cannot be made of the ruling in excluding the matter objected to, where it would have been adjudged insufficient on demurrer: *Chase v. Kaynor*, 78–449.

3927. Motion for more specific statement.

Where it was alleged that property had been taken by plaintiff in full payment of the claim sued on, and plaintiff moved to require defendants to state whether or not an agreement referred to by which the property was taken in payment was oral, and that they be required to set out a copy of the same, *held*, that as the motion asked but for one relief, to wit, the setting out of the copy, and as the case was not one wherein the setting out of the copy was necessary, the motion was properly overruled: *National State Bank v. Delahaye*, 82–34.

The objection that the petition in action for damages for personal injuries does not allege the skill of the plaintiff or his capacity to earn wages cannot be made a ground for excluding evidence of that element of damage, where no motion for more specific statement in respect to the basis of damages has been made: *Flanagan v. Baltimore & O. R. Co.*, 50 N. W. R., 60.

3936. Amount of proof; surplusage.

Where plaintiff sought to recover for medical services as family expenses, and averred in his petition that such services were necessary family expenses, *held*, that the averment that they were necessary being not required need not be proved: *Schrader v. Hoover*, 80–243.

In an action for damage by fire from an engine it is sufficient for plaintiff to set forth the occurrence of the injury, and an averment of negligence is mere surplusage; but such unnecessary averment does not change the burden of proof, and it is not sufficient to show that the company was not negligent in operating its road, but the presumption of liability is overcome only on proof that it was not guilty in the matters which were the immediate cause of the injury: *Engle v. Chicago, M. & St. P. R. Co.*, 77–661.

A party is not required to prove the unnecessary averments of a pleading. All that is required is proof sufficient to establish the cause of action or defense: *Knapp v. Cowell*, 77–528.

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3937. Genuineness of signature; denial.

Although defendant files a verified answer, yet, if he does not therein deny the genuineness of the note sued on, it may be admitted in evidence without proof of the genuineness of such signature: *Jones v. Baker*, 76–303.

An allegation by defendant that the instrument sued on by plaintiff has been materially changed after execution without defendant's knowledge and consent does not constitute a denial of the execution of the instrument, and it is therefore not necessary to introduce the instrument in evidence: *Hagan v. Merchants', etc., Ins. Co.*, 81–321.

If the signature to a written instrument is denied and is established by proof, the instrument imports a consideration: *McCormick v. Jacobson*, 77–582.

In an action upon a contract claimed to be held by plaintiffs by an assignment, where defendant's answer put in issue both the execution of the assignment and plaintiffs' ownership of the claim, *held*, that the burden was upon plaintiffs to establish the existence of the assignment and their ownership of the same when the action was commenced: *Probert v. Anderson*, 77–60.

3939. Matter in abatement.

An action to quiet title will not be abated because plaintiff brought a prior action for the same purpose which was dismissed before the second suit was tried: *Moorman v. Gibbs*, 75–537.

In an action praying for an injunction to restrain defendant from keeping a saloon for the sale of intoxicating liquors, where defendant pleaded in abatement the pendency of a former action, *held*, that the burden of proof was upon defendant to show that both actions related to the same place, and, *held*, also, that the evidence was insufficient to establish that fact: *Farley v. Hollenfeltz*, 79–126.

3941. Consolidation of actions.

In a particular case, *held*, that a consolidation of actions where one suit would have adjusted the entire issues of both cases would have been proper: *Turner v. Bradley*, 52 N. W. R., 364.

CHAPTER 9.

TRIAL AND JUDGMENT.

3946. Trial defined.

In conformity to this definition of trial, *held*, that the rendering of a judgment by a justice of the peace in a criminal case on a plea of guilty was not a trial in such sense as to entitle the justice of the peace to a trial fee: *Mathews v. Clayton County*, 79–510.

3947. Issues, how tried.

Issues in a special proceeding are triable to the court without a jury: *In re Bresee*, 82–573.

Issues at law arising in actions commenced by equitable proceedings are triable according to the method of trial in equity, and a party thereto does not have a right to jury trial: *Ryman v. Lynch*, 76–587.

Where a case was set for trial to the court, without exception being taken, and subsequently the pleadings were amended and an additional party was made plaintiff, *held*, that the defendant was not entitled to a jury, the jury having been dismissed for the term before the time set for the trial of the case, the question whether there was such change of circumstances to entitle the defendant to withdraw his consent to a trial by the court, and insist on a trial by jury, being within the discretion of the court for determination, and no review of its action on appeal being proper, unless such discretion should appear to have been abused: *Foster v. Hinson*, 76–714.

In an action for the possession of real estate and damages for its wrongful detention, where the question of ownership has been determined by equitable proceedings and judgment entered, the issue as to the value of the rents and profits need not be submitted to a jury, where there is no dispute as to the facts or amount: *Woodbridge v. Austin*, 81–671.

3948. Methods of trial in ordinary actions; appeal.

In an appeal in a law action it is not necessary nor proper to set out in the abstract evidence not necessary to explain exceptions taken to the rulings which are brought before the supreme court for review: *Hammond v. Wolf*, 78–227.

Further as to the record on appeal, see notes to § 4424.

3849. Method of trial in equity; appeal.

Introduction of evidence: Where records were allowed to be introduced in evidence contrary to an order that all documentary evidence should be filed with the clerk before the trial of the case, *held*, that the party complaining, if taken by surprise, should

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have moved for a continuance, but was not entitled to a decree in his favor on account of such erroneous action of the court: *Collins v. Valleau*, 79–626.

Certificate of the evidence: The judge's certificate to the short-hand notes and the reporter's certificate to his translation of the notes is a sufficient identification of the evidence to enable the supreme court to try the case anew: *Adams County v. Graves*, 75–642.

Where the documentary evidence filed with the certificate by the clerk is identified in the short-hand notes to which the judge's certificate is attached in due form, the evidence is sufficiently identified: *Richardson v. Gray*, 52 N. W. R., 10.

A certificate that all the evidence offered and introduced is made of record is not sufficient to enable the supreme court to try the case *de novo: Second Nat. Bank v. Ash*, 51 N. W. R., 1160.

A certificate that a transcript of the reporter's notes contains all the evidence introduced, but not showing that it contains all the evidence offered, is not sufficient to enable the court to try the case *de novo: Baldwin v. Ryder*, 52 N. W. R., 201.

That the evidence offered as well as that introduced must be set out in the abstract to enable the supreme court to try the case *de novo*, see notes to § 4424.

A transcript of the short-hand notes certified by the judge but never filed with the clerk is not so authenticated as to be entitled to consideration upon a trial *de novo* on appeal: *Baldwin v. Ryder*, 52 N. W. R., 201.

Even though it may be that documentary evidence can be certified by the clerk separately from the certificate of the judge to the transcript of the evidence taken down in writing, such certificate should be given within the time allowed for appeal: *Jamison v. Weaver*, 50 N. W. R., 34.

Where the translation of the reporter's notes is not filed in the lower court within six months from the decree the case cannot be tried *de novo* on appeal: *State v. Roenisch*, 77–379.

A party will not be entitled to a trial *de novo* upon appeal where the translation of the short-hand reporter's notes is not certified and filed in the office of the clerk within six months from the rendition of the decree: *Kavalier v. Machula*, 77–121; *Thomas v. McDaneld*, 77–126; *State v. Boyd*, 52 N. W. R., 513.

The statute determines the time within which the evidence in an equity action triable *de novo* on appeal must be made of record, and it is not competent for the court by fixing a time for filing a bill of exceptions to restrict the time fixed by statute: *Frank v. Hollands*, 81–164.

As to the time for filing transcript of short-hand notes in actions at law, see notes to § 4414.

Trial de novo: It is error to submit an issue of fact in an equity action to the determination of a jury, and the fact that such submission is erroneously made will not prevent the trial of the case *de novo* on appeal: *Frank v. Hollands*, 81–164.

Where it appears that the case was tried below as in equity, the evidence being in writing and certified by the judge, the cause will be tried *de novo* on appeal: *Ryan v. Heenan*, 76–589.

Where in an action commenced as a law action a motion was made to transfer the cause to the equity side of the calendar, and the record failed to show a ruling on the motion, or that the cause was thereafter treated as in equity, or that any equitable relief was given, upon appeal, *held*, that it would be presumed that the motion was not ruled upon by the court, but was abandoned by plaintiff, and the cause would be treated as an action triable by ordinary proceedings: *Johnson v. Webster*, 81–581.

On appeal in an equitable case, from a ruling on motion or demurrer, exceptions must be taken and errors assigned, as in an action by ordinary proceedings, and the hearing will be only upon the errors assigned: *Fink v. Mohn*, 52 N. W. R., 506.

Further as to trial *de novo* on appeal, see notes to § 4424.

3950. Finding of facts.

The findings here provided for must be made prior to or at the time the judgment is rendered, unless upon consent of the parties to the contrary, and an extension of time for signing bill of exceptions beyond the term will not give authority to the judge to file findings of fact after judgment is rendered, and such findings filed after the rendition of the judgment cannot be considered, although embodied in such bill of exceptions: *Hodges v. Goetzman*, 76–476.

Findings of fact in a particular case *held* proper, and not prejudicial, although the facts to which they related were not directly presented by any issue in the case: *British Amer. Ins. Co. v. Neil*, 76–645.

Objection cannot be made on appeal to error of the court in failing to state separately findings of fact and conclusions of law, unless objection thereto has been made in the lower court, and opportunity given the court to correct the error: *Ash v. Scott*, 76–27.

The finding of facts by the court cannot be reviewed on appeal where the evidence on which it was based does not appear of record: *Englert v. Roman Cath., etc., Soc.*, 82–465.

As to review, on appeal, of the findings of the court, and presumptions in favor thereof, see notes to § 4424.

3951. Trial term.

A rule of court as to trial notice construed, and *held*, that no trial notice was required as to the appearance term, nor as to the term at which the issues are first settled: *Erickson v. Barber*, 82–838.

It is not an abuse of discretion on the part of the trial court to set a cause for trial to the court before the issues are made up, the parties not insisting upon a jury trial: *Foster v. Hinson*, 76–714.

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3956. Continuance; cause for.

It is not error to refuse a continuance asked to enable a party to take additional evidence where it appears that ample time has been given for that purpose: *Hardin v. Iowa R. & Const. Co.*, 78-726.

A party is not entitled to a continuance or a postponement for the purpose of taking further evidence as a matter of right, but if he has additional evidence which he wishes to introduce, it should be so shown by affidavit: *Barnes v. Hekla F. Ins. Co.*, 75-11.

The absence of a witness cannot be made the ground for a continuance where the party has not subpœnaed such witness or made an attempt to do so: *Foster v. Hinson*, 76-714.

A continuance on account of the absence of a witness is properly denied where it does not appear that due diligence has been used to secure his attendance. *George v. Swafford*, 75-491.

Where defendant had had ample time in which to prepare for trial and did not file an amended answer pleading settlement until the day the cause was reached for trial, and showed no diligence in procuring the witnesses to prove such settlement, *held*, that the negligence of her attorney, who was also to be her witness to prove such settlement, in failing to appear at the trial, did not entitle defendant to a continuance: *Zabel v. Nyenhuis*, 49 N. W. R., 999.

3961. Objections; counter-affidavits.

Where the defendant in a criminal case files an application for a continuance, the state may file counter-affidavits contradicting other averments than those relating to the testimony of witnesses: *State v. Murdy*, 81-603.

The showing in a particular case *held* not sufficient: *Ibid.*

3978. Peremptory challenges.

Error in overruling a challenge to a juror is error without prejudice if the juror does not sit and the defendant does not exhaust all his peremptory challenges: *State v. Brownlee*, 51 N. W. R., 25.

3979. Causes of challenge.

Upon the trial of challenges other evidence than the testimony of the person challenged may be heard, and the court is required to determine both the law and fact involved. It is the duty of the court, therefore, to determine whether the opinion formed is an unqualified one on the merits of the controversy or whether the state of mind of the juror is such as would preclude him from rendering a just verdict. The court may take into account not alone the answers given, but the general demeanor and appearance of the person: *Sprague v. Atlee*, 81-1.

3986. Order of trial.

The court may, within its reasonable discretion, limit the number of witnesses on any point: *Minthon v. Lewis*, 78-620.

3987. Argument; burden of proof; right to open and close.

It is not proper for counsel in argument to comment upon an amended pleading which has been withdrawn: *Riley v. Iowa Falls*, 50 N. W. R., 33.

A party to an action has a right to have the cause fully and fairly argued to the jury, but after every point material to his interest has been presented in the opening argument, he cannot demand as a matter of right that his counsel be further heard, except in reply to the argument for the adverse party: *Carruthers v. McMurray*, 75-173.

An affidavit for a continuance when duly filed is a part of the record, and may be read to the jury and commented upon by counsel in argument, and it may be so read and commented upon although filed in another case with the understanding that it should apply to both: *Brannum v. O'Conner*, 77-632.

In a particular case, *held*, that while counsel may not have stated facts correctly in his argument, and was free in his inferences from such facts, yet he did not trangress so far in this respect as to require a reversal of the judgment: *Deere v. Wolf*, 77-115.

Failure of a party to call witnesses to prove a fact which must be within their knowledge may properly be made a subject of comment before the jury: *Van Slyke v. Chicago, St. P. & K. C. R. Co.*, 80-620.

Where an attorney by mistake referred to evidence given on a former trial, which had not been been introduced in the pending trial, and the opposite attorney made no objection thereto, although aware of the mistake, *held*, that the error would not be ground of reversal: *Pence v. Chicago, R. I. & P. R. Co.*, 79-389.

Statements made by counsel for plaintiff in his closing argument, relating to matters not in evidence, and not proper to be considered by the jury, *held* subject to criticism; but *held*, that counsel on the other side having made no objection at the time, and having in no manner called the court's attention thereto, nor asked that the offensive and unlawful argument be arrested, such improper argument would not be a ground for reversal on appeal: *Blair v. Madison County*, 81-313.

Objection cannot be made on appeal to the order of argument in the lower court where it appears that the order pursued was not objected to: *Sherman v. Hale*, 76-388.

The question as to who has the burden of proof is a matter of practice, and the ruling of the trial court will not be disturbed unless

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there is evidence of an abuse of discretion: *White v. Adams*, 77-295.

In an action on a note by the transferee thereof, in which the making of the note was admitted and also the assignment to plaintiff and the fact that it was unpaid, but the maker set up defenses to the note, and plaintiff in reply relied upon an estoppel against the maker from pleading such defenses, *held*, that the defendant had the right to open and close, there being no occasion for plaintiff to offer evidence of the estoppel until defendant had made a *prima facie* defense: *Seekel v. Norman*, 78-254.

3996. Instructions; in writing; exceptions.

In writing: In a civil action it is error to orally explain or modify an instruction asked by either party, and equally so for the court, on its own motion, to charge the jury orally: *State v. Harding*, 81-599.

A direction to a jury to retire and consider further of their verdict and answer an interrogatory previously propounded to them is not such an instruction as must be in writing: *Judge v. Jordan*, 81-519.

A remark of the court, not designed as an instruction to the jury, nor addressed to them, nor of a nature to be considered while they were deliberating upon their verdict, will not be presumed to have influenced their verdict: *Cormac v. Western White Bronze Co.*, 77-82.

Where the jury returned a verdict, and the judge stated to them that the verdict was not in accordance with the charge of the court, and directed them to retire and return a verdict in accordance with such charge, *held*, that such direction did not constitute an instruction required to be in writing: *Johnson v. Ridir*, 50 N. W. R., 86.

Where a stipulation in another case was introduced in evidence during the progress of a trial, and the court said in the presence of the jury, "I shall hold that by that stipulation defendants acknowledged that there was twelve hundred dollars and interest due the said railroad company that has not been paid," *held*, that as the remark was not addressed to the jury, and as there was no conflict in the evidence as to the fact that the amount named was in fact due the railroad company, and the question of indebtedness was fairly submitted to the jury, no prejudice could have resulted from the remark: *Cedar Rapids, I. F. & N. R. Co. v. Cowan*, 77-535.

Failure to mark: Failure to mark an instruction as given, appearing to be due to oversight and not objected to when the instruction was given, nor made the ground of a motion for a new trial, cannot be objected to for the first time on appeal: *Fish v. Chicago, R. I. & P. R. Co.*, 81-280.

Omission of the court to write the word "given" upon the margin of the instructions given to the jury cannot be taken advantage of on appeal, when no exception was taken to the omission, nor objection thereto made in the court below: *Knight v. Chicago, R. I. & P. R. Co.*, 81-310.

Duty to instruct: It is not necessary to warn the jury by instructions not to consider matters which have been in no way presented to them: *Pingery v. Cherokee & D. R. Co.*, 78-438.

The court may indulge a reasonable presumption as to the knowledge by the jury of principles commonly understood, and give such instructions on the basis thereof as will, under the evidence, enable the jury to reach a correct result: *Ibid.*

Where plaintiff sought to recover for injuries due to negligence of a railway company in operating its trains on two parallel tracks at a place where they were crossed by a highway, *held*, that it was not necessary for the court to point out to the jury each separate claim, or the evidence which might be properly considered in connection with it: *Pence v. Chicago, R. I. & P. R. Co.*, 79-389.

In an action for personal injuries received on a city street, it is error to fail to instruct the jury on the question of contributory negligence: *Ely v. Des Moines*, 52 N. W. R., 475.

Instructions not asked: Where the court has charged the jury fully in regard to its duties and the issues have been fairly submitted, a party will not be heard to complain of a failure to give other instructions which were not asked: *Duncombe v. Powers*, 75-185.

Where an instruction as to a certain rule of law was not asked for, *held*, that the failure of the court to give such instruction could not be complained of when the rule was not necessary for the correct determination of the case: *Deere v. Wolf*, 77-115.

Instructions which are correct as far as they go cannot be complained of because they do not cover questions as to which no instructions were asked by the party complaining: *Wimer v. Allbaugh*, 78-79; *Churchill v. Gronewig*, 81-449; *State v. Viers*, 82-397; *Wheelan v. Chicago, M. & St. P. R. Co.*, 52 N. W. R., 119.

Refusal: It is not error to refuse an instruction which is covered by the instructions given by the court: *Albrosky v. Iowa City*, 76-301.

Where the court has on its own motion given correct instructions on a particular point, it is not error to refuse others asked on the same point, even though they are also correct: *Bener v. Edgington*, 76-105; *Minthon v. Lewis*, 78-620.

In a particular case, *held*, that instructions asked and those given were so similar that there was no error in refusing those asked: *National State Bank v. Delahaye*, 82-34.

It is not error to fail to instruct the jury as to which party has the burden of proof where no instructions on that question are asked: *Duncombe v. Powers*, 75-185; *Martin v. Davis*, 76-762.

It is not necessarily error to refuse instructions asked which are intended as aids to the jury in weighing and considering the evidence. The court may rightfully say that such instructions are unnecessary: *Taylor v. Chicago, St. P. & K. C. R. Co.*, 76-753.

A refusal to give an instruction which in a conceivable view of the case ought to have been given will not necessarily be reversible error, as the court might trust somewhat to the common sense of the jury: *West v. Chicago & N. W. R. Co.*, 77-654.

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In general: *Held* not erroneous to instruct the jury to consider the whole case under the evidence and law as given them, and return such verdict as they think right: *McKenna v. Hoy*, 76–322.

In an action to recover on the ground of false representations, an instruction need not be confined to those representations testified to by plaintiff, but should be in language so general as to be applicable to any representations which are covered by the allegations of the petition: *Phelps v. James*, 79–262.

In an action to recover personal property by virtue of certain chattel mortgages, where the defense was that the mortgages were without consideration and were made to hinder and defeat the creditors of the mortgagor, an instruction which when taken alone appeared to direct the jury that, in order to succeed, the defendant must prove both of these allegations, *held* not misleading, when taken with other paragraphs of the charge: *Reigelman v. Todd*, 77–696.

Statement of issues: A plain and concise statement of the issues should always be given to the jury; but a party who has consented that the jury should determine the issues from the pleadings cannot complain of the failure of the court in this respect: *Burns v. Oliphant*, 78–456.

Where an instruction stating the issues was submitted to attorneys and approved by them, *held*, that objection could not afterwards be made on the ground that such instruction did not specifically refer to the issue presented by an amendment to the answer: *Sprague v. Atlee*, 81–1.

It is not necessary to instruct the jury with reference to issues which though raised in the pleadings or in the evidence have been withdrawn: *New Haven Lumber Co. v. Raymond*, 76–225; *Erickson v. Barber*, 82–838.

Where an instruction submitted one question which did not arise under the pleadings, but by other instructions the issues were submitted to the jury, and it was clear that the very question upon which, under the pleadings, the rights of the parties depended, was before them, *held*, that the judgment would not be reversed because of error in the one instruction: *Newton v. Ritchie*, 75–91.

Where a mortgagor brought action to recover possession of the mortgaged property and defendant interposed a general denial, and there was no question raised by the evidence as to plaintiff's ownership of the property, except as affected by the chattel mortgage, *held*, that it was not prejudicial error in the court to fail to present to the jury the issue as to plaintiff's general ownership, which was technically raised by the general denial: *Hollingsworth v. Holbrook*, 80–151.

Where the issues in the third division of an answer were substantially embraced in the second, *held*, that a statement of the issues of the third division was unnecessary: *Richmond v. Sundburg*, 77–255.

Instructions in a particular case as to the issues, *held* not erroneous in referring to the pleadings, the issues being fully presented in the instruction without such reference: *Morrison v. Burlington, C. R. & N. R. Co.*, 51 N. W. R., 75.

Where an instruction contained a reference to a certain matter "alleged in defendant's answer," *held*, that the reference was to a preceding instruction which contained the substance of the answer, and was not erroneous: *Probert v. Anderson*, 77–60.

It is error to instruct the jury that the plaintiff cannot recover without proving each and every of the allegations of the petition, where the petition contains averments of distinct elements of damage, proof of one or more of which would entitle plaintiff to recovery: *Harley v. Merrill Brick Co.*, 48 N. W. R., 1000.

In a particular case, *held*, that there was no error in submitting a particular issue to the jury, although the petition did not contain a direct allegation with reference to the matter thus submitted, there being allegations in the petition from which such averment could be implied: *Suge v. Haines*, 76–581.

In an action for assault and battery committed by defendant in ejecting plaintiff from his house, where the court instructed the jury that, if plaintiff and husband had been occupying the house with defendant's consent for more than thirty days, then defendant could not eject them except by process of law, *held* that, while the question of plaintiff's tenancy at will was not in issue, yet the charge was justified by defendant's plea that he had rightly ejected plaintiff and by the evidence on that issue: *Redfield v. Redfield*, 75–435.

Where the court in stating the issues in an action to recover for negligence substantially copied the petition, *held*, that it should have pointed out more specifically the negligence charged and should have directed the jury to inquire as to that only: *Gorman v. Minneapolis & St. L. R. Co.*, 78–509.

Matters not in issue: The court is not required to instruct the jury in regard to a matter not material to any issue in the case: *Duncombe v. Powers*, 75–185.

The court is under no obligations to instruct the jury in regard to a theory not raised by the pleadings, nor claimed to be true by either party, nor sustained by the testimony of any witness: *George v. Swafford*, 75–491.

Instructions may properly be refused relating to a question not put in issue by the pleadings nor constituting a matter of controversy in the evidence and as to which neither of the parties makes any claim: *Borland v. Chicago, M. & St. P. R. Co.*, 78–94.

An instruction which treats as in doubt or in issue the correctness of a matter which is admitted and not in dispute when the case is submitted is erroneous: *Blane v. Tharp*, 49 N. W. R., 1044.

In an action to recover a sum of money paid to release an attachment where the petition alleged that the demand upon which it was paid was illegal and unjust, but it did not charge either fraud or extortion, and there was no evidence to show either, *held*, that an instruction from which the jury might have found that the payment was obtained by fraud, compulsion or extortion was erroneous and not warranted by the pleadings or evidence: *Lyman v. Lauderbaugh*, 75–481.

An instruction in an action for negligence directing the jury to find as to negligence not

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alleged in the petition is erroneous. The case must be tried on the issues made in the pleadings: *Miller v. Chicago, M. & St. P. R. Co.*, 76–318.

In an action upon certain promissory notes, where the defense was an agreement for an extension of time made by the agent of plaintiff, and no claim was made by the pleadings of a subsequent ratification of such agreement by plaintiff, *held*, that while an instruction which submitted the question of subsequent ratification to the jury may have been erroneous, it was without prejudice to defendants: *Miller v. Root*, 77–545.

Questions not arising on the evidence: It is error to submit to the jury a question upon which there is no evidence: *Everingham v. Lee*, 78–630; *Trapnell v. Red Oak Junction*, 76–744; *Elder v. Stuart*, 52 N. W. R., 660.

No matter how carefully guarded the instruction in such a case may be, it can hardly be held that such instruction constitutes error without prejudice: *Trapnell v. Red Oak Junction*, 76–744.

It is not error to fail to instruct the jury with reference to an issue as to which there is no evidence: *Eckelund v. Talbot*, 80–569.

Where the whole record shows that there is but one disputed question in the case, it is not error in the court to fail to present other questions to the jury that might have been tried under the issues in the pleadings: *Scott v. Chicago, M. & St. P. R. Co.*, 78–199.

Where plaintiff alleged certain acts of negligence by defendant, but offered no evidence to sustain the allegations, and defendant pleaded a waiver of the negligent acts, *held*, that the question of waiver was properly withdrawn from the consideration of the jury: *Brooke v. Chicago, R. I. & P. R. Co.*, 81–504.

Failure to present an issue in the case to the jury will be error without prejudice where it appears that there could not have been a verdict for appellant on such issue: *Churchill v. Gronewig*, 81–449.

It is not prejudicial error to fail to call attention of the jury by instructions to an issue in a case on which there is no evidence to support a verdict in behalf of the party complaining: *Flanagan v. Baltimore & O. R. Co.*, 50 N. W. R., 60.

There is no error in an instruction which withdraws an issue raised in the petition, from the consideration of the jury, when there is no evidence to sustain such issue: *Whalen v. Chicago, R. I. & P. R. Co.*, 75–563.

In a particular case, *held*, that there was not such want of evidence in support of an instruction as to render it improper: *Brannum v. O'Conner*, 77–632.

It is error to give an instruction based entirely upon evidence which was improperly admitted: *Willits v. Chicago, B. & K. C. R. Co.*, 80–531.

Written contract: Where it was claimed that a contract was void as against public policy on account of provisions therein, *held*, that the contract should have been construed by the court, and that it was not proper to leave the question of its validity to the jury: *Merrill v. Packer*, 80–542.

As to questions of fact: It is error for the court to find the facts, and instruct the jury as to what the facts are: *Nimon v. Reed*, 79–524.

An instruction will not be erroneous which assumes facts which are admitted by the parties or about which there is no controversy: *McKenna v. Hoy*, 76–322; *Muir v. Miller*, 82–700; *Kenosha Stove Co. v. Shedd*, 82–540.

An instruction which directed the jury that "it would be a false representation if defendants delivered said so-called guaranty as a true description of said land, even though they did not in fact know said description to be false," *held* to be erroneous, as alleging that the representations by means of the guaranty were false, when such fact was one which should have been determined by the jury: *Phelps v. James*, 79–262.

As to evidence: While evidence should not be emphasized by an instruction, yet a judgment will not be reversed because the court told the jury that they should regard as evidence what in fact is evidence, as it is proper to call the attention of the jury to evidence which is obscure and which might escape their attention: *West v. Chicago & N. W. R. Co.*, 77–654.

In an action to recover for hay burned by fire from an engine, where the evidence was conflicting as to plaintiff's interest in the hay, *held*, that it was the duty of the jury to reconcile the evidence as best they could and render a verdict upon it, and an instruction that if there was any doubt as to plaintiff's interest he could not recover was properly refused: *Ibid.*

It is not competent for the court to direct the jury as to the effect of the evidence or the facts established thereby, unless there be no conflict in the evidence: *Lieber v. Chicago, M. & St. P. R. Co.*, 50 N. W. R., 547.

Where evidence is before the jury proper to be considered on one point but not proper as to another, the court should direct the jury that it is not to be considered as to the point as to which it is not proper: *State v. Lavin*, 80–555.

As to credibility of witness: It is proper to instruct the jury that in weighing the testimony of witnesses they should consider their demeanor and appearance and their lack of interest in the result of the action, and their interest or disposition to shield the party: *State v. Viers*, 82–397.

As to burden of proof: A party cannot complain of the giving of an instruction as to the burden of proof, when he failed to except to such instruction when given: *Duncombe v. Powers*, 75–185.

Neither can a party complain of failure to instruct as to the burden of proof when no instruction on that question is asked: *Ibid.*; *Martin v. Davis*, 76–762.

Instructions in a particular case as to burden of proof, *held* proper: *White v. Adams*, 77–295.

Construed together: All the instructions are to be construed together in determining the correctness of one of them: *Roberts v. Morrison*, 75–321.

The charge must be considered as a whole. *Fish v. Chicago, R. I. & P. R. Co.*, 81–280; *Martin v. Murphy*, 52 N. W. R., 662.

An instruction will not be held a ground for

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reversal where it is not erroneous when considered in connection with the other instructions: *Harrison v. Snair*, 76–558.

Courts cannot ordinarily embrace the law of a case in a single instruction, and the instructions must be considered together for the purpose of determining whether error has been committed: *Munger v. Waterloo*, 49 N. W. R., 1028.

All the rules upon a subject need not be given in one instruction when they are sufficiently presented in others: *Deere v. Wolf*, 77–115.

The fact that one instruction does not state all the rules of law applicable to a cause of action or a defense does not render it erroneous where other instructions cover the ground: *Chapin v. Chicago, M. & St. P. R. Co.*, 79–582.

An instruction apparently erroneous when taken alone, *held* to be without prejudice in view of the charge as a whole: *Riegelman v. Todd*, 77–696.

In the light of the evidence: Instructions are to be construed in the light of the evidence in the case: *Amos v. Buck*, 75–651.

Conflicting: In a particular case, *held*, that instructions given were in conflict and misleading: *Pumphrey v. Walker*, 75–408.

Law of the case: The jury are bound to follow the instructions given, although such instructions may not be in harmony with the law as declared by the supreme court, and if the verdict is not in harmony with such instructions, the judgment thereon will be reversed: *State v. Moore*, 81–578; *Davis v. Chicago, R. I. & P. R. Co.*, 49 N. W. R., 77.

An instruction to which no exception has been taken must be regarded as the law of the case, and if under the findings of fact as applicable to such instruction, a general verdict is erroneous, judgment should be rendered on the special verdict: *Krauskoff v. Krauskoff*, 82–535.

An instruction which is not objected to by either party must be deemed the law of the case: *Beck v. German Klinik*, 78–696; *Troxel v. Linton*, 77–90.

A party who has not appealed cannot, with the view of supporting the judgment on the verdict which is contrary to such instructions, claim that the instructions were erroneous: *Bellows v. Litchfield*, 48 N. W. R., 1062; *Fisk v. Chicago, M. & St. P. R. Co.*, 48 N. W. R., 1081.

Raising objections to sufficiency of pleadings: It is not proper by instructions to raise objections which might have been raised by motion or demurrer, but which have been waived by failure to make such objection: *Wimer v. Allbaugh*, 78–79.

It is error to instruct the jury so as to withdraw from them the consideration of evidence of an estoppel on the ground that the facts do not, in law, constitute an estoppel, such facts having been properly set out in the answer, and the sufficiency of the answer not having been questioned by demurrer: *Arndt v. Hasford*, 82–499.

Where the petition and proofs thereunder show no legal liability, the court may instruct the jury that plaintiff cannot recover, even though the demurrer to plaintiff's petition has been overruled, and defendant has answered: *Brown v. Cunningham*, 82–512.

Curing error: When improper evidence has been admitted the error may be cured by an instruction which excludes the same from the consideration of the jury: *Redfield v. Redfield*, 75–435; *Shepard v. Chicago, R. I. & P. R. Co.*, 77–54; *Pennington v. Pacific Mut., etc., Co.*, 52 N. W. R., 483.

In a particular case, *held*, that the court by taking the question entirely from the jury cured an error in admitting improper evidence on such question: *Pingery v. Cherokee & D. R. Co.*, 78–438.

Error in the admission of evidence may be so serious that it cannot be cured by instructions to the jury as to the application of the evidence admitted: *Hall v. Chicago, R. I. & P. R. Co.*, 51 N. W. R., 150.

Misconduct of counsel may be cured by direction of the court not to consider such matters, so as to render the improper action not prejudicial: *Egan v. Murray*, 80–180; *Nicks v. Chicago, St. P. & K. C. R. Co.*, 50 N. W. R., 222.

Exceptions: Instructions, and the exceptions noted upon the margins thereof, are a part of the record, without a bill of exceptions: *Allison v. Jack*, 76–205.

Where an instruction was given with others, and the fact of giving and the exception thereto were noted on the margain thereof just as on the margin of the others, but the judge failed to sign such entry as he did in case of the other instructions, *held*, that it sufficiently appeared that the exception was taken, such exception being duly certified with others in the bill of exceptions: *State v. Lavin*, 80–555.

Instructions will not be reviewed upon appeal, where exceptions to the instructions complained of were not taken within three days after the verdict: *Bush v. Nichols*, 77–171.

An objection taken to an instruction on motion for a new trial, without grounds of objection being stated, will not be considered: *Lyons v. Van Gorder*, 77–600; *Stanhope v. Swafford*, 80–45.

Instructions to which no exceptions have been taken cannot be reviewed on appeal: *Lewis v. Lewis*, 75–669.

A general exception to instructions *en masse* is not sufficient: *Reeves v. Harrington*, 52 N. W. R., 517.

3997. View of premises by jury.

Under this section, *held*, that the court might in its discretion direct the jury to view a gate, through which the testimony showed stock had got upon the track of a railroad company, it being claimed that such gate was insufficient: *Morrison v. Burlington, C. R. & N. R. Co.*, 51 N. W. R., 75.

But *held* that an instruction permitting the jury to give weight to their own observations, instead of using them for the more intelligent application of the testimony, was erroneous and prejudicial. It is only when the testimony cannot otherwise be so well understood and applied that a view is permitted, and, when it is permitted, the jury should be instructed as to the purpose and cautioned not to take their own observations as evidence: *Ibid.*

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4006. Further testimony after evidence closed.

Where the court permitted plaintiff, against defendant's objection, to introduce evidence after plaintiff had rested his case and before the argument to the jury had been commenced, *held*, that it would be presumed that the evidence had been omitted by oversight or inadvertence: *Randolph v. Bloomfield*, 77–50.

Where the court refused to admit a deposition after the case was closed on both sides, *held*, that as it did not appear that the deposition was otherwise admissible, the case would not be reversed: *Gorman v. Minneapolis & St. L. R. Co.*, 78–509.

Where both parties had rested, and plaintiff's witnesses had gone away, *held*, that it was not error to refuse to allow defendant to make another amendment and offer testimony in support thereof: *Osgood v. Bauder*, 82–171.

After the close of the evidence, and while the court was reading its charge to the jury, plaintiff asked permission to offer additional testimony alleged to have been newly discovered. *Held*, that as such evidence was cumulative and no diligence to procure it was shown, it was not error to refuse permission to introduce it: *Seekel v. Norman*, 78–254.

The right to introduce additional evidence does not exist after final submission: *Dunn v. Wolf*, 81–688.

It is competent for the court, after an equity cause has been tried and fully submitted, to set aside the submission on motion, and give the party leave to introduce additional evidence. While the statute contemplates that the additional testimony should be offered before the case is finally submitted, yet the submission cannot be said to be final, if an application be promptly made to set the submission aside, or, what amounts to the same thing, if a timely application be made to correct the mistake or omission by the introduction of additional evidence. Whether it is a final submission may be safely left for the trial court to determine: *Sickles v. Dallas Center Bank*, 81–408.

Where there is a misunderstanding between the court and counsel, on a motion to take the case from the jury, as to what witnesses have testified to, it is proper for the court to suggest that the witnesses be recalled: *State v. Huff*, 76–200.

Section applied: *McComb v. Council Bluffs Ins. Co.*, 48 N. W. R., 1038.

4010. Returning verdict; directing verdict.

The trial judge should sustain a motion to direct a verdict when, considering all the evidence, it clearly appears to him that it would be his duty to set aside a verdict if found in favor of the party upon whom the burden of proof rests: *Meyer v. Houck*, 52 N. W. R., 235; *Hirschl v. Case Threshing Mach. Co.*, 52 N. W. R., 363. And see *Osgood v. Bauder*, 82–171; *Mayer v. Chicago & N. W. R. Co.*, 82–249; *Sioux Valley State Bank v. Kellogg*, 81–124.

While there are cases in this state holding that a verdict should not be directed where there is a scintilla of evidence in support of a contrary conclusion, yet the foregoing rule is in accordance with the great weight of authority, and cases to the contrary are overruled: *Meyer v. Houck*, 52 N. W. R., 235.

Where there is a conflict upon the question of negligence it is for the jury to decide that question under the facts and circumstances, and a motion to take the case from the jury should be overruled: *Theissen v. Belle Plaine*, 81–118.

Where there is no dispute as to the facts showing contributory negligence of the person seeking to recover for personal injuries, the court may properly direct a verdict for the defendant: *Collins v. Burlington, C. R. & N. R. Co.*, 49 N. W. R., 848.

In an action for personal injuries where the

In a particular case, *held*, that the evidence as to the contributory negligence of the person for whose death an action was brought was such that the court erred in not directing a verdict for defendant: *Tierney v. Chicago & N. W. R. Co.*, 51 N. W. R., 175.

When any verdict, except for nominal damages, would, under the evidence, be improper, the action of the court in directing a verdict for defendant will not be reversed on appeal: *Williams v. Brown*, 76–643.

Where an action was brought on two claims pleaded in different counts, and on motion of the defendant the court rendered judgment on one count against plaintiff, and submitted the other to the jury, which returned a verdict against plaintiff, and a general judgment was then entered against him, *held*, that while the court may have erred in its practice in rendering judgment on the count instead of directing the jury to find for defendant upon it, the judgment was not void for that reason: *Lowery v. Greene County*, 75–338.

It is not improper to hear and consider in the presence of the jury a motion to direct the jury to render a verdict for the defendant: *State v. Huff*, 76–200.

Instructions in a particular case to the jury "to return a verdict in form as directed," *held* not to be a direction of the verdict, but

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cannot thereafter be based on defects in a motion made for that purpose: *Johnson v. Ridir*, 50 N. W. R., 36.

Polling the jury: Where it appears upon polling the jury that jurors do not agree, the court should send the jury out for further consideration of the case. It is not proper to receive affidavits of the other jurors to the effect that the verdict was agreed to by all the jurors, and render a verdict accordingly in disregard of the objection made when the jury is polled: *Jessup v. Chicago & N. W. R. Co.*, 82-243.

The court cannot by its order direct the return of a verdict, without opportunity to the unsuccessful party to have the jury questioned in open court as to their assent to such verdict: *Ibid.*

4014. Special verdict.

Where the ownership of a note was put in issue by the pleadings, and the jury, following the instructions of the court, returned the following verdict: "We, the jury, find that the amount loaned to defendant by John R. Pumphrey was $70, and that said loan was made on the 7th day of June, 1877," *held*, that the verdict was not sufficient to authorize a judgment for plaintiff, as it did not show a finding upon the issue as to the ownership of the note, nor a finding, general or special, for plaintiff: *Pumphrey v. Walker*, 75-408.

4015. General and special verdict; submission of interrogatories.

General verdict: It is reversible error to interfere with the discretion of the jury to return a general verdict. So *held* in a jury trial on the issues in a garnishment proceeding: *Shadbolt & Boyd Iron Co. v. Camp*, 80-539.

Special interrogatories on court's motion: A special interrogatory submitted by the court on its own motion is not required to be submitted to the inspection of counsel: *Briggs v. McEwen*, 77-305.

What proper: Where a special interrogatory calls for an answer which would be a determination of the case, it is a request for a special verdict rather than an answer to a special interrogatory, and is properly refused: *White v. Adams*, 77-295.

The court cannot be required to propound interrogatories calling for conclusions from facts rather than findings upon any particular questions of fact. Nor can it be required to propound interrogatories for findings of facts not necessarily determinative of the case; nor to submit particular questions not ultimate in their nature, or which could not well be considered or answered without danger of confusion or misrepresentation: *Thomas v. Schee*, 80-237.

In a particular case, *held*, that it was not improper to submit the question as to whether the note in suit was upon a consideration, it appearing that in view of the charge the interrogatory was not objectionable as calling for a legal conclusion: *Toledo Savings Bank v. Rathmann*, 78-288.

Requests for special findings which do not relate to ultimate facts but relate to questions incidentally arising, or requests which are likely to confuse the jury, may be refused: *Winter v. Central Iowa R. Co.*, 80-443.

Special interrogatories must ask a response as to the existence of some particular facts which must be material and pertinent to the matter in controversy, and must not embrace a series of facts which are necessarily included in and determined by the general verdict: *Whalen v. Chicago, R. I. & P. R. Co.*, 75-563.

Special interrogatories submitting immaterial facts. It is not error to refuse to submit an interrogatory the answer to which could not have controlled the general verdict. A party is not entitled to a special finding upon every circumstance which may have some bearing on the case: *Scagel v. Chicago, M. & St. P. R. Co.*, 49 N. W. R., 990.

An interrogatory *held* not proper which required the jury, in action for negligence, to find "what negligent act was done, or what duty omitted," as it left the jury to canvass the whole field of negligence rather than the acts alleged: *Gorman v. Minneapolis & St. L. R. Co.*, 78-509.

Where the issue was whether or not a certain mortgage was given for the purpose of hindering and defrauding creditors, and the court submitted by a special interrogatory whether it was made and received for the purpose of hindering and defeating creditors, *held*, that if there was any difference between "defrauding" and "defeating" creditors it was not material, as the jury could not have been mislead thereby under the instructions: *First National Bank v. Fenn*, 75-221.

Refusal to submit: Interrogatories should be clear and distinct, and capable of being answered briefly, and should not refer to immaterial facts. It is not error to refuse to submit an interrogatory the answer to which could not have controlled the general verdict. A party is not entitled to a special finding upon every circumstance which may have some bearing on the case: *Scagel v. Chicago, M. & St. P. R. Co.*, 49 N. W. R., 990.

There is no error in refusing to submit special interrogatories, when the answers, however given, could not affect the general verdict: *Hablichtel v. Yambert*, 75-539; *Van Horn v. Overman*, 75-421.

A refusal of the court to submit special interrogatories to the jury, *held* not prejudicial where it appeared that such interrogatories were not relevant to any issue in the case, or where no answer could have been given which would have controlled the general verdict in the absence of other special findings: *Cormac v. Western White Bronze Co.*, 77-32.

Failure to answer: Where the jury fails to respond through inadvertence to an interrogatory, and omits to state a material point of the finding required thereby, the court may direct them to retire and answer such interrogatory, before receiving their verdict: *Bank*

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cient declaration of the jurors' want of ability to answer the question, and that it was not error to refuse to require them to retire for the purpose of making such answer: *Grannis v. Chicago, St. P. & K. C. R. Co.*, 81–444.

Where the jury were directed that if they found for plaintiff they should answer a special interrogatory submitted by the court, and they returned a verdict for plaintiff but did not answer the interrogatory, and after the verdict was filed and read the court returned the verdict to the jury and directed them to "retire and consider further of their verdict, and return a verdict with answer to the special interrogatory," and they returned the same verdict with the answer, *held*, that there was no error in the action of the court, and no prejudice to defendants: *Judge v. Jordan*, 81–519.

A failure to answer special interrogatories will not be ground for setting aside the verdict where there are other facts than those suggested by the interrogatories upon which it may rest: *Andrews v. Mason City & Ft. D. R. Co.*, 77–669.

Where a jury does not return an answer to a special interrogatory and the party in whose behalf it is submitted does not insist thereon, he will not be heard to urge for the first time on appeal the objection that such interrogatory was not answered: *Mack v. Leedle*, 78–164.

Where the fact inquired about in the interrogatory appears, in view of the answers to other interrogatories, to be immaterial, failure to answer it cannot be made a ground of objection: *Seekel v. Norman*, 78–254.

A judgment will not be disturbed on appeal because the special findings were not so full or accurate as they might have been, where the findings as to such interrogatories could not have controlled the result: *Pence v. Chicago, R. I. & P. R. Co.*, 79–389.

In a particular case, *held*, that answers to certain special findings, whatever way they were answered, would not have been inconsistent with the general verdict, and therefore the failure to give definite answers was immaterial: *McMarshall v. Chicago, R. I. & P. R. Co.*, 80–757.

4016. General and special verdict inconsistent.

The special findings of the jury cannot prevail over the general verdict, unless it affirmatively appears that they are inconsistent therewith: *Mitchell v. Joyce*, 76–449.

It is only when the special findings of facts are manifestly inconsistent with the general verdict that the special findings should control: *Johnson v. Miller*, 82–693.

The findings and verdict should be in harmony. And *held*, that it was not error to direct the jury that they should be careful that the answers to interrogatories were in harmony with and in support of their general verdict, although it would have been better to have cautioned them to be careful that their general verdict was in harmony with the answers to the interrogatories: *Capital City Bank v. Wakefield*, 48 N. W. R., 1059.

In a particular case, *held* proper to instruct the jury, in connection with the submission of special interrogatories, that they should be careful that the answers to the interrogatories supported and were in harmony with their general verdict: *Des Moines, etc., Co. v. Polk County, etc., Co.*, 82–663.

Where under the instructions in the case, which were not objected to, and the findings of fact by the jury, a general verdict is erroneous, it should be set aside, and judgment rendered on the special verdict, in accordance with the instructions: *Krauskoff v. Krauskoff*, 82–535.

In the absence of a special finding to the contrary, it will be presumed from the general verdict that the jury found the existence of facts necessary to support the general verdict: *Johnson v. Miller*, 82–693.

A general verdict on a claim for various items of damage will not be erroneous, in the absence of a request for special findings, and under such circumstances it cannot be determined whether the findings on any item exceeded the amount thereof stated in the petition: *Clampit v. Chicago, St. P. & K. C. R. Co.*, 50 N. W. R., 673.

Where the answers to special interrogatories were not in conflict with the general verdict, nor such as to have influenced it, *held*, that the fact that some of the interrogatories related to immaterial matters, and as to others there was a dispute as between the parties, would not make a submission of such interrogatories prejudicial error: *Sage v. Haines*, 76–581.

4022. Reference; by consent.

A party who agrees to a trial by a referee thereby waives a trial by jury: *In re Assignment of Hooker*, 75–377.

4028. Report; exceptions; judgment.

The exceptions referred to in this section are not such as are taken before the referee, but those to the report after it is returned to the court, and an exception taken to a judgment rendered upon such report is not sufficient to bring up for review on appeal an alleged error in the report itself: *Bolton v. Kitsman*, 80–343.

If the conclusions of a referee are inconsistent with the facts which he reports, the latter must govern, and the court may correct or disregard such erroneous conclusions: *In re Assignment of Hooker*, 75–377.

4038. Exceptions; what and when taken.

Exceptions necessary: Where no exceptions were taken to the rulings of the court, objections to such rulings will not be considered upon appeal: *Spelman v. Gill*, 75–717.

A party objecting to a decision or ruling in a justice court must make his objection known at the time in order to have the decision reviewed upon appeal: *Coudray v. Stifel*, 77–283.

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In equity: On appeal in an equitable case from a ruling on motion or demurrer exceptions must be taken and errors assigned as in an action by ordinary proceedings, and the hearing will be only upon the errors assigned: *Fink v. Mohn*, 52 N. W. R., 506.

Where a case is triable *de novo* an objection to the admission of evidence which was made below may be renewed upon appeal, even though no exception was taken to its admission below: *Cochran v. Breckenridge*, 75–213.

How taken: The noting of a general exception at the end of a decree to all rulings set out in the decree will not be sufficient to have a ruling on demurrer reviewed upon appeal, but the party excepting must have the record show an election to stand on the demurrer: *Stanbrough v. Daniels*, 77–561.

Bill of exceptions; time for filing: The bill of exceptions must be settled at the term unless the time is extended by consent or order of the court. The addition of the last clause to the section as it previously stood did not change the long established rule to that effect: *Deering v. Irving*, 76–519.

A bill of exceptions filed later than the time fixed by agreement of the parties will not be stricken out on appeal where it is admitted that the abstracts present all the evidence introduced on the trial: *Richardson v. Blinkiron*, 76–255.

Where sixty days were allowed defendant in which to file a bill of exceptions, and none was filed until more than seven months after the time allowed, when one was filed by leave of court, and a certified copy of the evidence filed at the same time, *held* the bill of exceptions was filed too late: *Short v. Chicago, M. & St. P. R. Co.*, 79–73.

Where sixty days from March 17th were given in which to file a bill of exceptions, *held*, that a bill filed on May 17th could not be considered: *McCord v. Rafferty*, 51 N. W. R., 24.

An agreement for the submission of a cause and for a decision in vacation as of the last day of the term does not have the effect of extending the time for filing the bill of exceptions: *Edwards v. Cosgro*, 77–428.

Where a stipulation was filed for sixty days in which to file bill of exceptions after ruling on motion for arrest of judgment and new trial, and such motion was determined at a term subsequent to that at which the trial was had, *held*, that it was not necessary that an order should have been entered of record at the term at which the case was tried extending the stipulation beyond that term: *Elter v. O'Neil*, 49 N. W. R., 1013.

Where a bill of exceptions is not filed within the time allowed therefor, it is not within the power of the lower court on motion, without notice to the opposite party, to grant leave of time to file. If there is any reason for extending the time beyond that originally allowed, it ought to be discovered, and an order asked before the original time given expires: *Rosenbaum v. Partch*, 52 N. W. R., 181.

The fact that the findings provided for by § 3950 are embodied in a bill of exceptions filed by agreement after the term will not obviate the objection that such findings were not filed before judgment: *Hodges v. Goetzman*, 76–476.

When necessary: Improper remarks of the judge in the presence of the jury, made a ground of motion for new trial, should, for the purpose of appeal from the ruling of the court on such motion, be preserved by bill of exceptions, and not by affidavits in the lower court: *State v. Hall*, 79–674.

Where a judgment or order is entered of record, and is not disputed, the record, and not the bill of exceptions, is the proper source of information as to what such order is: *In re Estate of Pyle*, 82–144.

See, further, notes to §§ 4414 and 4424.

What sufficient filing: A bill of exceptions which has been signed by the judge and handed to the clerk to be filed is filed in contemplation of law, even though the clerk has failed to properly indorse the fact that it has been filed: *Foster v. Hursen*, 75–291.

The leaving of a bill of exceptions with the clerk is a sufficient filing thereof, and the fact that it is afterwards taken by the attorney filing it, to prepare an abstract, will not defeat the effect of such filing: *Sheldon Bank v. Royce*, 50 N. W. R., 986.

4039. Form and grounds of exception.

Where judgment is entered on a referee's report, exception to such judgment will not preserve for review objections to the report which were not made in the lower court: *Bolton v. Kitsman*, 80–343.

Where exception was entered to a ruling instructing the jury to return a verdict for defendant, *held*, that such exception related to that ruling and not to a former ruling refusing to allow plaintiff to dismiss the action: *Westlake v. Muscatine*, 52 N. W. R., 117.

The practice of making statements in the presence of the jury of what is offered to be proven being often objectionable, the court may properly require the questions to be raised by interrogatories propounded to the witness when they can be so raised: *Osgood v. Bauder*, 82–171.

4041. Writings identified; skeleton bill; reporter's notes.

The identification of certain documents in the reporter's translation of his notes embodied in a bill of exceptions, *held* sufficient to render such documents a part of the record: *Johnston v. McPherran*, 81–230.

Where a skeleton bill of exceptions directed the clerk to insert the short-hand reporter's translation of evidence, and the official translation failed to show the cause in which the evidence was given, except by indorsement upon the outside of the last leaf of the translation, which indorsement was not in the handwriting of the reporter, *held*, that the translation was not sufficiently identified and the evidence would be stricken from the record: *Joy v. Bitzer*, 77–73.

A bill of exceptions referring to the short-hand reporter's notes and the evidence as on file, and making them and the translation thereof a part of the bill of exceptions, and

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directing the clerk to copy the translation into the bill of exceptions, is sufficient to preserve the evidence as embodied in the reporter's notes: *Hunter v. Burlington, C. R. & N. R. Co.*, 76-490.

To make the short-hand notes a part of the record it is not necessary to attach them to the bill of exceptions if they are properly referred to. The transcript when properly certified becomes a part of the record by such reference in the bill of exceptions: *Waller v. Waller*, 76-513.

The depositing of the short-hand notes in due time in the court below, though they are not marked filed, is sufficient, though the evidence does not become a part of the record until the short-hand notes, together with a translation thereof, are deposited in the clerk's office, and the evidence thus presented is duly certified by the judge: *Harrison v. Snair*, 76-558.

The short-hand reporter's notes become a part of the record in the case and may be made a part of the bill of exceptions by incorporating them into a skeleton bill by reference, and the transcript of such notes need not be filed within the time allowed for taking an appeal, but it will be sufficient if such transcript is filed in time to allow the proper presentation of the case to the supreme court: *Hammond v. Wolf*, 78-227.

A short-hand report of the evidence, duly certified by the judge and made a part of the record, constitutes a bill of exceptions within the requirements of the statute, and, in an action at law, the fact that the translation is not filed until more than six months after the judgment is rendered is not a fatal objection: *Fleming v. Stearns*, 79-256.

4043. Exceptions must be material.

Questions no longer material: Mere abstract questions or those involving rights no longer existing will not be considered on appeal. *Potts v. Tuttle*, 79-253; *Chicago, R. I. & P. R. Co. v. Dey*, 76-278.

Rulings in party's favor: A party cannot complain of an erroneous instruction when the error relied on is in his favor: *Deere v. Wolf*, 77-115.

Where the answers to questions objected to are favorable to the party objecting, the error, if any, will be without prejudice: *State v. McGee*, 81-17.

Error not affecting the result: An error committed in favor of an intervenor to whom no relief of any kind is finally granted is without prejudice and no ground of complaint upon appeal: *Farmers' Bank v. Arthur*, 75-129.

Where the jury by a special verdict found that an alleged contract had never existed, *held*, that the exclusion of evidence relating solely to plaintiff's measure of damages for a breach of the contract was immaterial and without prejudice: *Carruthers v. McMurray*, 75-173.

An error in admitting evidence as to special damages is without prejudice and is not ground for reversal, when the court does not render judgment for any damages: *Coleman v. Reel*, 75-304.

An instruction which erroneously excludes a claim on a contract is without prejudice, when the contract upon which the claim is made is invalid: *King v. Mahaska County*, 75-329.

Erroneous rulings in regard to matters which were material on the trial, only upon a theory of the case not accepted by the jury in their verdict, will constitute error without prejudice: *McIntire v. Eastman*, 76-455.

Where in a prosecution for murder complaint was made of the admission in evidence of acts and declarations of an alleged co-conspirator, not made in the presence of the defendant, *held*, that as the jury returned a verdict of manslaughter its findings must have been that the killing was not the result of conspiracy, and therefore any errors in instructions with reference to conspiracy were errors without prejudice: *State v. Row*, 81-138.

Where it appears from the finding of the jury that a recovery could not have been had upon an issue raised in the case, the case will not be reversed on account of failure to present such issue: *Churchill v. Gronewig*, 81-449.

Where under the finding of facts by the jury it appears that an erroneous instruction could not have affected the result, it will be deemed to have been without prejudice: *Fisk v. Chicago, M. & St. P. R. Co.*, 48 N. W. R., 1081.

The fact that a party introduced evidence not required to sustain his cause of action will not constitute prejudicial error: *Hagan v. Merchants', etc., Ins. Co.*, 81-321.

It is not prejudicial error to fail to call attention of the jury by instructions to an issue in a case on which there is no evidence to support a verdict in behalf of the party complaining: *Flanagan v. Baltimore & O. R. Co.*, 50 N. W. R., 60.

A case will not be reversed for the giving of an instruction, where the verdict could not have been different had the instruction not been given: *Phelps v. Walkey*, 50 N. W. R., 560.

Error in admitting evidence upon an issue not finally submitted to the jury is without prejudice: *Trulock v. Donahue*, 52 N. W. R., 537.

Error committed in instructions with reference to a higher degree of a crime than that for which defendant is convicted will not necessarily be error without prejudice. Thus where in a prosecution for murder the court erred in instructing the jury as to whether certain facts would constitute a provocation reducing the crime to manslaughter, *held*, that such error was not without prejudice, although the conviction was for manslaughter: *State v. Adams*, 78-292.

The giving of contradictory instructions will be regarded as prejudicial error, which will be reversed upon appeal, as it would be uncertain which one the jury followed: *Neville v. Chicago & N. W. R. Co.*, 79-232.

It cannot be claimed that because evidence which is erroneously excluded is cumulative, therefore the error is without prejudice: *Snyder v. Witwer*, 82-652.

A judgment will not be disturbed upon ap-

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peal because of error in the admission of evidence where it appears that no prejudice resulted: *Seska v. Chicago, M. & St. P. R. Co.*, 77–137.

Where a mistake was made in the decree in the numbers of certain certificates of stock ordered to be sold, *held*, that the error was without prejudice and no ground for reversal: *Ft. Madison Lumber Co. v. Batavian Bank*, 77–893.

Error in sustaining a motion to strike on grounds which should have been raised by demurrer will be error without prejudice, where no objection is made to the motion on that ground and the matter stricken out would have properly been held insufficient on demurrer: *Chase v. Kaynor*, 78–449.

Where it appears from the testimony and the finding of the court that no prejudice could have resulted from the admission of testimony objected to, errors in the submission will not be ground for reversal: *Rappleye v. Cook*, 79–564.

The admission of certain evidence *held*, if erroneous, to be error without prejudice, and not ground for reversal: *Worden v. Humeston & S. R. Co.*, 76–810.

Although the overruling of a motion to strike redundant and irrelevant matter from a petition may be erroneous, it is error without prejudice, for the defendant may urge his objection at the trial: *Ida County v. Woods*, 79–148.

That failure to allow nominal damages will be deemed without prejudice, see notes to § 4424.

Error immaterial in view of other matters in the record: It is not necessary to reverse a judgment for failure to instruct as to the necessity of finding a fact which is substantially admitted of record: *State v. Shank*, 79–47.

Where the lower court erred in admitting testimony, but sufficient evidence was properly admitted to justify the judgment, *held*, that the error was without prejudice and the judgment would not be disturbed: *Rosenthal v. Miller*, 79–130.

An error in submitting a question of estoppel to the jury, *held* not prejudicial when the effect of the estoppel, if it had been proven, would be to establish a fact which was otherwise proven: *Bartlett v. Fireman's Fund Ins. Co.*, 77–155.

It is not prejudicial error to admit evidence as to a certain fact which is established by other competent and satisfactory evidence: *Ibid.*

The admission of incompetent evidence to prove a fact already admitted, which could not be regarded as relating to the point in issue, *held* not prejudicial: *Key v. Des Moines Ins. Co.*, 77–174.

It is not error to exclude an answer as to a question with reference to which the witness has already fully testified: *Sprague v. Atlee*, 81–1.

The erroneous admission of evidence is error without prejudice, where the fact sought to be established by such evidence is otherwise fully established: *Muir v. Miller*, 82–700.

In an action to recover damages for the wrongful suing out of attachment, errors in the instructions with reference to the measure of damages will be immaterial where the attachment was not wrongfully sued out: *Mayne v. Council Bluffs Savings Bank*, 80–710.

Error cured by subsequent proceedings: Where an erroneous ruling is made but is afterwards corrected by the trial court, the error is cured by the subsequent action and is not ground for reversal upon appeal: *Van Horn v. Overman*, 75–421.

An error in admitting secondary evidence is cured and without prejudice when primary evidence is afterwards admitted upon the same matter: *Amos v. Buck*, 75–651.

The sustaining of an objection to a question will be error without prejudice where the witness afterwards testifies fully as to the matter inquired about: *Way v. Chicago & N. W. R. Co.*, 76–393.

Where a witness testified as to the result of a conversation without having testified that he was present, *held*, that any error in refusing to sustain an objection on that account was error without prejudice in view of the cross-examination by the opposite party: *Seekel v. Norman*, 78–254.

Error in excluding the evidence of a witness cannot be complained of on appeal where it appears that he was afterwards recalled and permitted to testify fully as to the matter referred to: *State v. Shank*, 79–47.

Where objections to questions on cross-examination are sustained on the ground that they are not proper in cross-examination, but the party afterwards makes the witness his own and thus secures answers to such questions, error in the exclusion of the evidence will be deemed without prejudice: *In re Assignment of Rea*, 82–231.

The sustaining of an objection to a question will be error without prejudice if the witness afterwards testifies fully as to the matter thus inquired about: *Cahalan v. Cahalan*, 82–416.

Error in overruling a challenge to a juror, *held* to be without prejudice where the juror did not sit, and the defendant had not exhausted his peremptory challenges: *State v. Brownlee*, 51 N. W. R., 25.

Where evidence as to damages was improperly admitted, but the court required a remission of a portion of the verdict, greater than could have been due to such improper admission of evidence, *held*, that the error was thereby cured: *Hurlbut v. Hardenbrook*, 52 N. W. R., 510.

Where evidence was erroneously received in support of one count of an indictment, but the court afterwards instructed the jury to find for defendant on that count, *held*, that the error in the receipt of the evidence was cured: *State v. Craig*, 78–637.

Where certain books were admitted in evidence and extracts were read therefrom, and afterwards the books were excluded, *held*, that such ruling removed any prejudice that might have resulted from the improper admission of evidence of witnesses with reference to such books: *Rea v. Scully*, 76–343.

As to curing error by instructions, see notes to § 3996.

What record must show: Error must affirmatively appear: See notes to § 4424.

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4044. New trial; grounds for.

Discretion: The ruling upon a motion for a new trial will not be disturbed upon appeal where it appears that the court has not abused its discretion by such ruling. This is especially true where a motion for a new trial is granted: *Peebles v. Peebles*, 77–11.

Where the evidence is conflicting, and the court in the exercise of its discretion sustains a motion to set aside a verdict on the ground that it is not sustained by sufficient evidence, the ruling will not be interfered with unless it clearly appears that injustice has been done: *Morgan v. Wagner*, 79–174.

Misconduct of jury: A judgment will not be reversed because of alleged misconduct of the jury in permitting the bailiff and sheriff to communicate with them, where there is nothing to indicate that the jury could have been influenced by the communication: *Miller v. Root*, 77–545.

Where it appeared that one who was not a member of the jury slept in the same room with the jurors and had conversation with one or two of them, in which he made statements reflecting upon the character of plaintiff and his credibility, *held*, that such misconduct was a sufficient ground for granting a new trial. When jurors have been exposed to improper influence, it will not do to inquire into the probability of the extent of such influence and its effect upon the verdict, but the verdict must be set aside: *Welch v. Taverner*, 78–207.

Where, after the general verdict was agreed upon, a physician was summoned to prescribe for a juror with the consent of the defendant, *held*, that there was not such misconduct as to make a new trial necessary: *Wesley v. Chicago, St. P. & K. C. R. Co.*, 51 N. W. R., 163.

Although it is allowable for jurors to ask occasional questions of witnesses while they are giving their testimony, it is improper for a juror to enter upon disputes and discussions with the counsel in the case as to the construction of the testimony: *Truman v. Bishop*, 50 N. W. R., 278.

But in a particular case, *held*, that any prejudice resulting from such improper conduct was cured by an instruction to the jury: *Ibid.*

Where on a claim of misconduct of a juror there are conflicting affidavits, the action of the court in granting a new trial will not be interfered with: *Wightman v. Butler County*, 49 N. W. R., 1041.

Misconduct of attorney: It is improper and censurable practice for an attorney to make statements designed to prejudice a party to the suit, which are not justified by the record in the case, and when this rule is violated the judgment should be set aside unless the court is satisfied that the misconduct was not instrumental in securing it; but an application to set aside a verdict on the ground of misconduct of counsel must be determined by the trial court in the exercise of a sound legal discretion, and the supreme court will not interfere unless an abuse of discretion is shown: *George v. Swafford*, 75–491.

The fact that a part of a deposition which is subsequently excluded is read to the court, in the presence of the jury, in arguing the question whether it should be admitted or not, does not constitute misconduct which may be the ground for a new trial: *Rogers v. Winch*, 76–546.

Where a motion for a new trial was made upon the ground of the misconduct of an attorney in commenting, in the absence of the judge, upon a case which had been read to the court in the hearing of the jury, *held* that, if there was misconduct as charged, no abuse of the discretion of the court was shown and the action would not be disturbed: *Shepard v. Chicago, R. I. & P. R. Co.*, 77–54.

Where the only evidence of the alleged misconduct of an attorney in argument is in the form of a statement contained in a motion for a new trial, it will be disregarded: *Gray v. Chicago, M. & St. P. R. Co.*, 75–100.

Where complaint is made of the argument of counsel, such argument will not be considered upon appeal, where it is not shown by the abstract that it was preserved by a bill of exceptions: *Nelson v. Chicago, M. & St. P. R. Co.*, 77–405.

Where counsel cited as facts matters about which there was no testimony, but the court instructed the jury not to consider such statements as in any way affecting the case, *held*, that any prejudice resulting from the improper conduct of counsel was removed: *Nicks v. Chicago, St. P. & K. C. R. Co.*, 50 N. W. R., 222.

Accident or surprise: Where a motion for a new trial was made on the ground of surprise caused by certain testimony, *held*, that the ground was not well taken, as the statement of witness could not have been prejudicial, the fact to which it related not having been denied: *Key v. Des Moines Ins. Co.*, 77–174.

Circumstances of a particular case, including illness of attorney for defendant, *held* sufficient to warrant the setting aside of the judgment rendered by default and the granting of a new trial under the provisions of § 4383: *Wishard v. McNeil*, 78–40.

The mere showing by a party that during the trial he was absent, with reasons therefor, *held* not sufficient to entitle him to a new trial. The rules in regard to the showing necessary in setting aside a default are not applicable to a new trial: *Seiberling v. Schuster*, 49 N. W. R., 844.

The fact that a witness gave an incorrect answer by reason of not understanding the question will not be a ground for new trial, at least unless it appears that prejudice resulted to the party from the incorrect evidence: *State v. Viers*, 82–397.

Excessive damages: Where excessive damages are not made the basis of a motion for a new trial, a party cannot on appeal object that in assessing the amount of recovery the jury allowed more than the proper amount for certain items for which recovery was permitted: *Reynolds v. Iowa & Neb. Ins. Co.*, 80–563.

There is no express ground for new trial based upon the insufficiency of the damages awarded by the jury, but it may properly be inferred from the language of § 4046 that a new trial may be granted where the damages found by the jury are less than the actual pe-

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cuniary damages sustained: *Kinser v. Soap Creek Coal Co.*, 51 N. W. R., 1151.

Newly-discovered evidence: There is no rule recognized in this state to the effect that, where a verdict has been found for plaintiff in an action for slander in which defendant pleads justification, a new trial on account of newly-discovered evidence cannot be granted: *Boggess v. Read*, 50 N. W. R., 43.

Where the defense in an action to recover back money paid for purchase of intoxicating liquors was that the seller had a permit to sell and the sales were therefore lawful, *held*, that a showing that the record of such permit could not be found at the time of the trial, but was subsequently found in an unused room in the court-house where meetings of the board of supervisors had previously been held, was a sufficient showing of newly-discovered evidence to entitle the party to a new trial: *Grotte v. Schmidt*, 80–454.

Where it does not appear that the facts relied upon were not known to the party at the time of the trial, and he did not ask for a continuance in order that he might establish them when it became apparent that they were important, he is not entitled to a new trial for the purpose of establishing such facts: *State v. Morgan*, 80–413.

Statements in regard to diligence, which are in the nature of conclusions and do not recite facts from which the court may determine whether or not due diligence was used, will not be sufficient: *Cahalan v. Cahalan*, 82–416.

The fact that the affidavit states conclusions rather than particular facts goes rather to the value of the affidavit as evidence than to its legality: *Boggess v. Read*, 50 N. W. R., 43.

It is not necessary in the showing of diligence to state that the evidence on account of which a new trial is asked was not known to the attorney of the party: *Ibid.*

Where newly-discovered evidence is cumulative or impeaching in its character, it is not ground for a new trial: *Donnelly v. Burkett*, 75–613.

The newly-discovered evidence in a particular case, *held* to be cumulative and therefore not ground for a new trial: *State ex rel. v. Oeder*, 80–72.

To render newly-discovered evidence cumulative so that it will not be considered sufficient ground for new trial, it must be additional to other evidence on the same point. Other evidence of the same ultimate fact as that upon which evidence was introduced on the trial will not necessarily be cumulative: *Boggess v. Read*, 50 N. W. R., 43.

Therefore, in an action for slander, in charging plaintiff with lewdness, *held*, that newly-discovered evidence as to other acts tending to show lewdness was not cumulative: *Ibid.*

Newly-discovered evidence will not be deemed insufficient as ground for a new trial because it is cumulative of evidence elicited on cross-examination, which is incidentally favorable to the party examining: *White v. Nafus*, 51 N. W. R., 5.

Errors of law: Objections which might have been raised by demurrer or motion in arrest of judgment are deemed waived if not thus raised, and cannot be raised by motion for new trial: *Brockert v. Central Iowa R. Co.*, 82–369.

4045. Motion for new trial, when and how made.

Where a motion for a new trial was made more than three days after judgment was rendered, but contained an averment in which it was described as a petition, and contained statements and demands for relief which would be proper in a petition, *held*, that the motion was sufficient, and even if it had been objected to in the court below, the objection might have been overruled and the application treated as if by petition: *Council Bluffs L. & T. Co. v. Jennings*, 81–470.

Where plaintiff had, by stipulation, five days after the verdict in which to file motion in arrest of judgment, and for a new trial, which motions were duly filed, *held*, that by insisting on the judgment for motion on special findings, the motion for new trial was not waived, but that it might be insisted upon after the motion for judgment was overruled, although it was then too late to have filed a motion for new trial: *Pieart v. Chicago, R. I. & P. R. Co.*, 82–148.

4046. For smallness of damages.

From the provisions of this section it appears that a new trial may be granted where the damages found by the jury are less than the actual pecuniary damages sustained: *Kinser v. Soap Creek Coal Co.*, 51 N. W. R., 1151.

4048. Conditions.

In a particular case, *held*, that the action of the trial court in holding that the condition in regard to the payment of costs by a certain time had been sufficiently complied with to entitle the party to a new trial was not so far without support as to be interfered with on appeal: *First Nat. Bank v. Brown*, 81–208.

4051. Dismissal of action.

One of several co-plaintiffs may dismiss an action as to himself whenever, in his judgment, the right or his interest requires him to do so: *Ocheltree v. Hill*, 77–721.

The right to dismiss an action without prejudice does not exist after the final submission of the case to the jury or to the court: *Dunn v. Wolf*, 81–688.

This section by construction denies a right to dismiss after the submission of the case to the court, and it is not competent for an attorney by an understanding with the court to reserve the right to dismiss without prejudice in the event the court decides against him: *McArthur v. Schultz*, 78–364.

Where defendant, after the conclusion of

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plaintiff's evidence, moved the court to instruct the jury to find for defendant, which motion, being fully submitted, the court indicated that it would sustain, but had not yet made the entry on the calendar, nor given to the jury the instruction requested, *held*, that a dismissal of the action by plaintiff was in time: *Morrisey v. Chicago & N. W. R. Co.*, 80–314.

Dismissal of an action in the court where it is pending will terminate any right to have the supreme court consider an appeal from an interlocutory order in such case: *Chicago, R. I. & P. R. Co. v. Dey*, 76–278.

4056. Judgment; final adjudication.

What constitutes: A judgment by confession is a judgment, and valid until it is set aside in a proper proceeding: *Dullard v. Phelan*, 50 N. W. R., 204.

Where notice of appeal specifies "the judgment" in the case, it is a sufficient indication that the appeal is from the final adjudication with reference to the party appealing: *Searles v. Lux*, 52 N. W. R., 827.

An adjudication is a different thing from a satisfaction of such adjudication, and where judgment was rendered for damages and further provided that the successful party should have certain property, or the value thereof, *held*, that the payment of the amount of the judgment did not prevent a subsequent action for the value of such property: *Morrison v. Springfield Engine, etc., Co.*, 51 N. W. R., 183.

Evidence: The record of a judgment of a court of general jurisdiction is admissible in evidence, without proof of the service of process and the pleadings: *American Emigrant Co. v. Fuller*, 50 N. W. R., 48.

As to proof of judgment, see, also, notes to § 4963.

Jurisdiction: So long as the judgment debtor is content to permit a judgment to be enforced against his property, a stranger to the judgment cannot question its validity on account of the want of jurisdiction: *Wright v. Mahaffey*, 76–96.

Where suit was brought against N. Young, and a garnishee was sought to be held for indebtedness due N. S. Young, *held*, that the question whether N. S. Young was the same person as defendant N. Young was raised by the answer in the case, and was for adjudication: *Allison v. Chicago, B. & Q. R. Co.*, 76–209.

Further as to validity of judgment in case of defective service or want of service, and how the question may be raised, see notes to § 3809.

Where liability does not appear: Judgment need not be entered on a petition and proofs which show no legal liability, even though a demurrer to the petition has been overruled, and defendant has answered over, denying such allegations: *Brown v. Cunningham*, 82–512.

And see notes to § 3856.

4061. Judgment against one of several defendants.

A party against whom judgment is rendered prior to the determination of the suit as against his co-defendants is not constructively in court after the rendition of such judgment, and is not bound by the subsequent proceedings in the case: *Okey v. Sigler*, 82–94.

4065. On special findings.

A motion for judgment on special findings will not waive the right to insist upon a motion for new trial filed at the same time, and if the former is overruled the latter may be considered: *Pieart v. Chicago, R. I. & P. R. Co.*, 82–148.

4066. Judgment notwithstanding verdict.

In an action upon certain promissory notes, where an issue in the case had not been disposed of, *held*, that it was error to render a judgment on the pleadings: *Black v. De Camp*, 75–105.

4068. Judgment by agreement.

Where the parties to a number of like cases agreed that judgment might be entered in the court in which they were pending, when a certified copy of the judgment in one case which had been removed to another county for trial was filed, and in pursuance of the agreement judgments were ordered by the judge and entered by the clerk of the court in vacation, *held*, that the stipulation was that one trial should settle the issues in all the cases, and that judgment might be entered by the clerk in vacation, and that judgment thus entered was valid: *Western Land Co. v. English*, 75–507.

4074. Discharge of judgment.

Where receipts were drawn up to joint judgment debtors with the arrangement that they were to pay their *pro rata* shares, a provision for costs having been omitted by oversight, a judgment creditor refused to receive the amounts agreed upon and the receipts were taken without his consent. *Held*, that the judgment was not satisfied: *Dorgan v. Piehn*, 51 N. W. R., 84.

Where land belonging to a party had been sold under several judgments, one of which was against his mother as surety, and the mother arranged with a third party to acquire the certificates of sale and extend the right to redeem, *held*, that the payment was not a payment in satisfaction of the judgments, as she had a right to acquire and hold the judgments for her own protection: *Bleekman v. Butler*, 77–128.

Where the payee of a note became liable

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thereon by indorsement and was made a party defendant in an action on the note against the maker, and default was taken against him but no judgment rendered, *held*, that a purchase by him of the judgment against the maker, and an assignment thereof to him or one acting for him, would not constitute a satisfaction of such judgment: *Des Moines Savings Bank v. Colfax Hotel Co.*, 79–497.

Where a judgment was obtained against the maker and indorser of a promissory note, and the indorser placed money in the hands of an agent, who was to obtain an assignment of the judgment to himself and afterwards assign it to plaintiff, but the agent assigned it to one N., who received money for the satisfaction of the judgment from the maker of the note, and at the time of the assignment to N. he and the maker of the note knew that the agent had no interest in the judgment or authority to assign it to any one but the plaintiff, *held*, that the maker of the note could not discharge his obligation to the indorser by paying the amount of the judgment to N., and that, as the judgment was satisfied by the unauthorized payments of the maker, the indorser and plaintiff, his assignee, could treat the judgment as satisfied in fact and recover the amount paid by the indorser not exceeding the sum required to satisfy the judgment: *Johnson v. Webster*, 81–581.

Where a surety advanced money to enable his wife to purchase the judgment against him, *held*, that this would not constitute a satisfaction of the judgment and his interests would be protected: *Anglo-American Land, etc., Co. v. Bush*, 50 N. W. R., 1063.

4076. Default.

The order for default is not a judgment but a final declaration of an admission which takes the place of evidence. A judgment is rendered upon default as a judgment is rendered upon evidence: *Walker v. Cameron*, 78–315.

Therefore, under § 4084, which authorizes a motion to set aside default in cases of service by publication to be made within two years from the rendition of judgment, the time commences to run from judgment and not from the entry of default: *Ibid.*

The party in default may move for modification of the judgment to make it conform to the pleadings: *Mickley v. Tomlinson*, 79–383.

4078. Setting aside default.

Courts should favor the trial of causes upon their merits, and it would require an exceedingly strong and conclusive showing of abuse of discretion to authorize the supreme court to interfere with action of the lower court setting aside a default and allowing a defense to be made where judgment on the default has not already been entered: *McQuade v. Chicago, R. I. & P. R. Co.*, 78–688.

In a particular case, *held*, that plaintiffs' neglect to appear through their attorneys was inexcusable, and a motion to set aside a default was properly overruled: *Williams v. Westcott*, 77–332.

The showing in a particular case of diligence and of merits, *held* sufficient, and the overruling of the motion error: *Ellis v. Butler*, 78–632.

The affidavit of merits may be made by the attorney where it appears that the attorney had knowledge of the matter of defense relied upon as an excuse for the delay: *Ibid.*

A showing of reason of absence, such as will warrant the setting aside of default, will not be sufficient showing of ground for new trial: *Seiberling v. Schuster*, 49 N. W. R., 844.

4084. New trial after judgment on publication.

The relief authorized by this section is a retrial. If upon that trial the party seeking relief from the judgment fails to establish his defense, then the judgment must be confirmed, and the rights under it left undisturbed. But if upon new trial it is found that such party has a valid defense in whole or in part, then the judgment must be modified or set aside, and in either event the party who secured the judgment is not entitled to any rights under it as originally entered: *Clark v. Ellsworth*, 51 N. W. R., 31.

No relief from the judgment rendered before default, and no restitution of the property acquired under it, are authorized until a retrial is had (§ 4383): *Stanbrough v. Cook*, 49 N. W. R., 1010.

The two years' period within which the motion must be made commences to run from the time of judgment and not from the time of entering default: *Walker v. Cameron*, 78–315.

It is evidently contemplated that the bond shall be ordered and approved when the judgment is set aside and not before action upon the motion. If, therefore, the bond is insufficient or no bond is given, objection should be made at some stage of the proceedings and cannot be raised for the first time on appeal: *Ibid.*

Where a party recovering judgment on service by publication conceals the fact until after the expiration of the two years within which a retrial could be applied for under this section, equity will grant relief: *Clark v. Ellsworth*, 51 N. W. R., 31.

4089. Lien of judgment.

How long continued: The lien of a judgment will not be extended as against a junior lienholder by the levy of an execution within the statutory period of limitation, but without a sale thereunder until after the expiration of ten years from the date of the judgment: *Albee v. Curtis*, 77–644: *Lakin v. McCormick*, 81–545.

A judgment lienholder has not the right after ten years to redeem from prior liens: *Albee v. Curtis*, 77–644.

Where a judgment is rendered in a justice

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court and a transcript is filed in the district court it becomes a lien for ten years from the date of the filing of the transcript, and such judgment may be enforced by execution issued at any time within twenty years from the time of filing the transcript: *Rand v. Garner*, 75–311; *Stover v. Elliott*, 80–329.

Where execution was improperly issued on a judgment after the death of defendant, *held*, that although a sale under such execution was void, the judgment continued a lien on the property for ten years, but after the expiration of that time it ceased to be a lien and the prior mortgage on the premises became a first lien thereon: *Bull v. Gilbert*, 79–547.

Upon what property: In enforcing a judgment lien the law looks to the equitable interest, and the judgment does not attach to the legal title in the hands of one who does not have such equitable interest: *Brebner v. Johnson*, 50 N. W. R., 35.

A judgment is a lien upon an equitable interest in real estate owned by defendant at the time of its rendition or subsequently acquired: *Rand v. Garner*, 75–311.

Therefore *held*, that a judgment against defendant became a lien on real estate which he subsequently purchased and took possession of, but which had not been conveyed to him, being held by the grantor as security for the unpaid purchase-money: *Ibid.*

Where real property was voluntarily and without consideration conveyed by the husband to the wife, the husband remaining in possession and control of the property, *held*, that such conveyance was not made as a devise, but as a gift, and that a judgment against the wife attached thereto and followed the property on a reconveyance to the husband: *Craig v. Monitor Plow Works*, 76–577.

Where a contract for land was assigned by a husband to his wife and the premises were then occupied by them as a homestead, *held*, that they were exempt as a homestead from liability for judgments against the husband subsequent to such assignment: *Belden v. Younger*, 76–567.

Priority: The lien of a judgment does not take precedence of a prior agreement under which the premises in controversy are transferred to a trustee to secure indebtedness: *Anglo-American Land, etc., Co. v. Bush*, 50 N. W. R., 1063.

A judgment lienholder may, by execution and sale, acquire all the rights of the owner of the property as against a senior mortgagee, and moreover may, when the mortgagee seeks to foreclose such mortgage, set up the claim that it is fraudulent as to creditors: *Ramsdell v. Tama Water Power Co.*, 51 N. W. R., 245.

Where it appears by the record that a judgment became a lien upon land and so continued, the burden is on a party who claims that the land was sold to him before the rendition of such judgment to establish that fact: *Hodge v. Dent*, 80–378.

4090. When lien attaches.

A judgment is not rendered nor does it operate as a lien until it is entered of record in the books prescribed by statute, among which is the "index of liens:" *Ætna Life Ins. Co. v. Hesser*, 77–381.

4092. Transcript docketed.

This section is to be considered together with the two preceding sections, and requires the abstract to be indexed in order to complete the record and make it a lien: *Ætna Life Ins. Co. v. Hesser*, 77–381.

CHAPTER 10.

JUDGMENT BY CONFESSION.

4104. How entered.

A judgment by confession is one entered without action, and if the note on which the judgment is confessed stipulates for attorney's fees in case action be brought thereon, attorney's fees cannot properly be included in the judgment: *Dullard v. Phelan*, 50 N. W. R., 204.

4106. Statement of claim.

Where a note on which a judgment by confession was sought was attached to the statement properly identified, *held*, that this constituted a concise statement of the facts, within the meaning of this section: *Dullard v. Phelan*, 50 N. W. R., 204.

The statement in a particular case of the facts out of which the indebtedness arose, *held* sufficient: *Brown v. Barngrover*, 82–204.

4107. Judgment; execution.

When a proper statement in writing, duly signed and verified, is filed, it is the duty of the clerk to enter judgment for the amount fixed, and to issue execution as in other cases: *Dullard v. Phelan*, 50 N. W. R., 204.

Such judgment should be signed by the judge, and when entered in vacation should be approved and signed at the next term; but failure to sign at next term as directed by § 223 will not render the judgment void: *Ibid.*

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Where a judgment was entered in 1884, and confirmed in 1889, *held*, that the approval was sufficient: *Brown v. Barngrover*, 82–204.

It is competent in a judgment by confession on notes secured by mortgage to provide that the property covered by the mortgage shall be sold without redemption: *Cook v. McFarland*, 78–528.

The statute with reference to attorney's fees (§ 4159) does not authorize the taxation of such fees when the judgment is rendered by confession: *Dullard v. Phelan*, 50 N. W. R., 204.

CHAPTER 11.

OFFER TO COMPROMISE.

4110. Offer of judgment.

Where judgment is entered for more than the amount of the tender, the amount offered is never material: *Russell v. Critchfield*, 75–69.

An offer to confess judgment for a certain amount with costs to date of offer, "said amount to be a full settlement of the above cause," is not a conditional offer, and when defendant made such offer, which was refused and judgment afterwards recovered against defendant for a less amount than the offer, *held*, that it was not error for the court to tax the costs accruing after date of offer to the plaintiff: *De Long v. Wilson*, 80–216.

CHAPTER 12.

RECEIVERS.

4113. When and how appointed.

A creditor who has not yet reduced his claim to judgment cannot maintain a bill to subject the land to the payment thereof, and have a receiver appointed: *Clark v. Raymond*, 50 N. W. R., 1068.

An order made in vacation appointing a receiver is appealable the same as if made in term time: *Ibid.*

Under a mortgage providing that in case of default the mortgagee might take possession and apply the rents and profits of the property to the satisfaction of the mortgage, *held*, that in the absence of any express provisions for the appointment of a receiver, it was error to make such appointment and authorize the receiver to take possession of the property during the period of redemption for the benefit of the mortgagee: *Swan v. Mitchell*, 82–307.

Also, *held*, that the appointment of a receiver was improper, in view of the want of proof that the mortgagor was insolvent: *Ibid.*

Where there was a question as to whether a certain note belonged to the president of an insurance company individually or was the property of the company, *held*, that the receiver was entitled to the possession of such note, and the court might, in an equitable action brought by such receiver against the president, have such possession awarded to him without an adjudication as to the question of the title to the note itself: *Brandt v. Allen*, 76–50.

4115. Powers and liabilities.

The receiver of a corporation may maintain an equitable action against officers thereof charged with concealing its assets with the purpose of converting the same to their own use, to compel the surrender to him of all property to the possession of which he is entitled as such receiver: *Brandt v. Allen*, 76–50.

The general rule is that trustees and like officers empowered by courts to manage the affairs of others cannot exercise such authority outside of the limits of the state in which they are appointed, and the cases in which receivers have been allowed to thus act outside of the jurisdiction of their appointment are to be regarded as exceptional: *Ayres v. Siebel*, 82–347.

Where a loan company had made sale of certain securities and received payment therefor, delivery of such securities to be made when they should be procured and ready for delivery, and a receiver of such company was afterwards appointed, *held*, that the purchaser of such securities had a right therein which a court of equity would protect, no adverse rights having been acquired by third parties: *Kimball v. Gifford*, 78–65.

Under particular facts, *held*, that the receiver was warranted in construing a failure of a party to object to a proposition to sell property at private sale as a consent thereto, and such sale was upheld: *Yetzer v. Applegate*, 52 N. W. R., 118.

In such case *held*, that in the absence of a showing of prejudice, it appearing that the consideration received was more than the appraised value, the sale should be affirmed: *Ibid.*

A person operating a railway as receiver is liable in an action under § 1972, providing for double damages in cases of injuries to stock where the road is not fenced: *Brockert v. Central Iowa R. Co.*, 82–369.

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CHAPTER 13.

SUMMARY PROCEEDINGS.

4116. Judgments on motion.

A motion does not ordinarily seek a final adjudication of a controverted matter: *Dullard v. Phelan*, 50 N. W. R., 204.

An adjudication in a proceeding under this section that an attorney is not liable for the money sought to be recovered from him is an adjudication binding on the person claiming the money, so as to bar a subsequent action for the same cause: *Hawk v. Evans*, 76–593.

The filing of an answer by respondent in such proceeding does not throw any additional burden upon the complainant, and a failure to file a reply cannot be construed as an admission of the averments of the answer: *State v. Morgan*, 80–413.

The fact that the relationship of attorney and client in the transaction involved is denied will not deprive the court of jurisdiction in this proceeding to determine that question: *Ibid.*

Where money is paid to the clerk to apply on a judgment, the court has jurisdiction under this section to make such order as to the disposition of the money as the facts may require: *Peterson v. Hays*, 51 N. W. R., 1143.

CHAPTER 14.

MOTIONS AND ORDERS.

4121. Motion defined.

A motion to instruct the jury to render verdict for defendant on the evidence is not such a motion as need be in writing: *Young v. Burlington Wire Mattress Co.*, 79–415.

4123. Proof by affidavit.

Issues of fact may arise upon motion: *Lease v. Franklin*, 51 N. W. R., 21.

CHAPTER 15.

SECURITY FOR COSTS.

4137. When required.

The provisions of this section do not apply to a proceeding auxiliary to execution under § 4364: *Estey v. Fuller Implement Co.*, 82–678.

A question raised by motion to require additional security for costs is addressed largely to the discretion of the court: *Turner v. Younker*, 76–258.

4141. Attorney or officer cannot be security on bond.

This section is applicable to administrator's bonds: *Cuppy v. Coffman*, 82–214.

CHAPTER 16.

COSTS.

4143. Recoverable by successful party.

In a proceeding to subject defendant's property to the lien of a judgment for damages for the sale of intoxicating liquors thereon by a tenant, although defendant is not personally liable, yet if he resists the relief asked, costs may properly be taxed against him: *McVey v. Manatt*, 80–132.

Where in an action for specific performance and other relief it was found that plaintiff was entitled only to recover a sum of money paid

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in part performance of a contract to purchase land which the vendor had rightfully rescinded, and vendor had, when vendee tendered the balance of the purchase-money, offered to repay the amount received, and it was found that vendee was entitled only to the return of the money paid, *held*, that there should be no recovery of costs: *Ellsworth v. Randall*, 78–141.

If costs are erroneously taxed, it is the duty of the party against whom they are taxed to apply to the court for a retaxation, and without such application he cannot raise the question in the supreme court on appeal: *Allen v. Leonard*, 52 N. W. R., 557.

In a contest as to the probate of a will, where the party seeking the probate does not act in the capacity of executor, but in his own interests, and is unsuccessful, the costs are to be taxed to him: *Ibid.*

4144. Apportionment.

Action of the court in apportioning costs will be presumed to have been in accordance with facts appearing to the court: *Minnesota Stoneware Co. v. Knapp*, 75–561.

Where the verdict is for defendant, but in a less amount than he appears entitled to on a counter-claim, to the extent of plaintiff's claim, and it does not appear that plaintiff could have secured his rights in the matter except by suit, there should be an apportionment of the costs: *Gravel v. Clough*, 81–272.

Where defendant admitted plaintiff's claim and interposed counter-claims, but the costs of the trial resulted from attempting to establish a claim which was not allowed, *held*, that an apportionment of costs was properly denied: *Smith v. Hess*, 48 N. W. R., 1030.

Where a party brings an action founded on separate items of demand, and recovers on part of them, the court may in its discretion apportion the costs. But where the cause of action is a single claim, the reduction in the amount does not entitle the losing party to an apportionment. So where a constable brought suit against the county for fees, and the county set up the defense of settlement as to a particular part of the account, and plaintiff recovered only on a portion of the items, *held*, that apportionment of costs was proper: *Potts v. Polk County*, 80–401.

4145. Collection of costs.

The proceeding by a motion for the collection of costs as contemplated by this section is a proceeding for the recovery of a money judgment and will be barred in five years under the statute of limitations. The costs cannot be tacked to the judgment so as to suspend the operation of the statute of limitations; and even if the remedy by motion were exclusive, the officer could not, by omitting to cause a fee-bill to be issued, prolong the statutory period: *State Ins. Co. v. Griffin*, 51 N. W. R., 63.

4152. Clerk to tax.

A party who is called upon to produce his books is not entitled to have taxed as costs in his favor the expense of having a statement made showing the condition of accounts as appearing in such books: *McNider v. Sinine*, 51 N. W. R., 170.

The costs to be taxed for taking depositions are the fees allowed by statute in this state and not the fees allowed according to the laws of the state where the depositions are taken, if taken out of the state: *Ibid.*

4159. Attorney's fees.

This act does not authorize the taxation of an attorney's fee when the judgment is rendered by confession: *Dullard v. Phelan*, 50 N. W. R., 204.

Where several notes were in litigation before one of them was due, and the maker was entitled to a set-off on the note which would necessarily have to be abandoned if it was paid before maturity, *held*, that plaintiff could not be said to be in default on the note, or that suit had been brought to collect it, and attorney's fees should not be allowed: *Otcheck v. Hostetter*, 77–509.

This section does not apply to contracts made before it took effect: *McCormick v. Jacobson*, 77–582.

4160. Amount of attorney's fees.

No evidence as to what is a reasonable fee is required; the amount due on the instrument being ascertained, the fee authorized may be fixed by the court without other proof of what is reasonable than that contained in the record of the case: *Cook v. Gilchrist*, 82–277.

4161. Affidavit.

An affidavit in a particular case *held* sufficient to support the finding of the court that there was no unlawful agreement and that fees might properly be allowed under the terms of the note: *Black v. De Camp*, 78–718.

The affidavit of one member of a firm of attorneys is sufficient under this section: *Cook v. Gilchrist*, 82–277.

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TITLE XVIII.

ATTACHMENTS, EXECUTIONS, AND SUPPLEMENTARY PROCEEDINGS.

CHAPTER 1.

ATTACHMENTS AND GARNISHMENT.

4165. What petition in attachment must state.

It is not required under this section as it is under § 3878 that a verification by plaintiff's attorney must show that he had knowledge of the statements contained in the petition: *Sioux Valley State Bank v. Kellog*, 81–124.

An attachment issued upon the ground of non-residence avails nothing, unless the defendant has property or debts owing to him in the state: *Montrose Pickle Co. v. Dodson & Hills Mfg. Co.*, 76–172.

Therefore, *held*, that an action could not be maintained against a non-resident defendant, by means of garnishment served in the state upon the carrier having property of defendant in its possession in course of transportation outside of the state: *Ibid.*

A partnership may have a residence distinct from the residence of its members, and an attachment may be sued out against it, on the ground that it is about to remove permanently out of the county of its residence, and has property there which is not exempt from execution, and refuses to pay or secure the plaintiff: *Ruthven v. Beckwith*, 51 N. W. R., 153.

The surety on a partnership note may have ground of attachment against the partnership on account of contemplated removal and refusal to pay or secure a claim, although the surety has not paid the note: *Ibid.*

A mere intention to remove from the state will not make a person who is an actual resident of the state a non-resident: *Mann v. Taylor*, 78–355.

Where defendants by false representations induced plaintiff to purchase land worth six hundred and forty dollars for twenty-two hundred and fifty dollars, *held*, that defendants were liable for the loss and damage, and their liability was a debt "due for property obtained under false pretenses," and an attachment was properly issued: *Stanhope v. Swafford*, 77–594.

4175. Action on bond; damages.

Right to recover: The wrongful suing out of attachment is not established by proof that the party causing it to be issued had no reasonable ground to believe that the alleged grounds for attachment were true, but there must be proof that they were not in fact true, and the burden of proof is on the one alleging the wrongfulness of the act: *McCormick v. Colliver*, 75–559.

The burden is on the party suing on the bond to show both that the ground alleged for the attachment was not true, and that the party suing out the attachment had not reasonable ground for believing it to be true, or that the party suing out the attachment had not facts and circumstances within his knowledge such as gave reasonable ground of belief that the ground stated was true. The material facts may be established by fair inference from many facts duly proven: *Deere v. Bagley*, 80–197.

It is not necessary that the information upon which the creditor acts be true if he acts in good faith and with reasonable care, nor is it necessary that he should act only upon such information as would be competent evidence in court: *Ibid.*

The fact that the petition is not filed nor the writ issued for three days after the verification of the petition does not indicate want of good faith: *Ibid.*

A member of a firm cannot recover for seizure of his individual property under a bond given in a suit against the firm only: *Brumwell v. Stebbins*, 49 N. W. R., 1020.

Where in one count of an answer defendant alleged facts showing that the suing out of a writ of attachment, and the seizure of all his goods thereunder, was the breach of a contract obligation on the part of plaintiff towards him, *held*, that such division of the answer constituted a separate cause of action from that set out in another count, based upon an attachment bond: *Mitchell v. Joyce*, 76–449.

Where it is not averred in the action on the bond that damages remain unpaid but the case is tried on the issue as to the liability, no objection being made on account of failure to aver such fact in the pleadings, the objection cannot be entertained on appeal: *Knapp & Spalding Co. v. Barnard*, 78–347.

Where it is charged that the debtor is about to dispose of his property with intent to defraud his creditors, a purpose to dispose of his property with such intent, and all acts of his tending to show such intent, may be proven or considered whether before or after the attachment: *Mayne v. Council Bluffs Savings Bank*, 80–710.

An instruction in a particular case *held* not to be objectionable as open to the criticism

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that it indicated that the matters acted upon in suing out the attachment had the appearance of truth: *Ibid.*

Erroneous instructions as to the measure of damages will be immaterial if the attachment was not wrongfully sued out: *Ibid.*

Secret instructions given by the debtor to his employees cannot be proved for the purpose of showing that the debtor was not disposing of his property with fraudulent intent, and that therefore the attachment was wrongfully sued out: *Deere v. Bagley*, 80–197.

For the purpose of showing that the attachment is wrongfully sued out it is not proper to prove that another attachment was levied at the same time in another state for the same indebtedness: *Ibid.*

Effect of recovery: If the defendant by a counter-claim recovers damages for the wrongful suing out of a writ, which are deducted from the amount of plaintiff's recovery, he is not entitled after judgment to have the property discharged, but it should be held to satisfy such judgment: *Cole v. Smith*, 50 N. W. R., 54.

Where a counter-claim was interposed for damages on a bond and the judgment allowed recovery on such counter-claim, and further provided that the plaintiff should return to defendant the attached property, or that the defendant should recover its value, and the judgment was thereupon paid but the property was not returned, *held*, that the right to recover on the bond for the failure to return the property was not adjudicated, and might be made the basis of a subsequent action: *Morrison v. Springfield Engine, etc., Co.*, 51 N. W. R., 183.

Damages: Where a writ of attachment is wrongfully sued out, the measure of damages is such a sum as will compensate the defendant for the actual injury suffered: *Empire Mill Co. v. Lovell*, 77–100.

And where property was seized and sold, and the proceeds applied to the payment of the defendant's debts, *held*, that the measure of damages for the wrongful attachment was the difference between the proceeds of the sale and the value of the property at the time of the seizure: *Ibid.*

For the purpose of showing the damages suffered by reason of the attachment, the attachment defendant may show that some of the goods were salable only at certain seasons and that by reason of the attachment they could not be sold until the following year. In such case the true measure might not be the difference between the market value of the goods when seized and their value at the date of the trial by reason of the fact that they are of such nature that if carried over from one season to another they are subject to damage from dust and moisture and are liable to be of little demand the second season, and by reason of the fact that goods out of season are sold by dealers at a discount: *Knapp & Spalding Co. v. Barnard*, 78–847.

In an action on an attachment bond for damages to a stock of goods seized under the attachment, the defendant in attachment should be permitted to prove the value of the goods, as tending to show the damage by removal and detention, and also that any part of the goods was of a perishable nature and the extent to which such goods were damaged by reason thereof while detained under the attachment: *Jamison v. Weaver*, 81–212.

The measure of damages in regard to property sold under attachment is the difference between what its value was at the time it was taken and the proceeds of the sale thereof, credited on the indebtedness: *Ruthven v. Beckwith*, 51 N. W. R., 153.

Testimony as to the financial condition of the defendant, though not known to the plaintiff, is admissible as bearing upon the charge of intent to defraud: *Ibid.*

In an action upon a bond for the wrongful suing out of an attachment, where the property levied upon was lumber kept for sale, *held*, that the owner was not entitled to receive interest on the value of the lumber for the time the same was withheld from him, where no claim was made of damages because of a loss of sale: *Fullerton Lumber Co. v. Spencer*, 81–549.

Where it appears that there was in fact no levy of the attachment, there can be no recovery of damages on the bond, and a counter-claim seeking to recover such damages may be withdrawn from the jury: *Sioux Valley State Bank v. Kellog*, 81–124.

In an action on a bond, plaintiff may recover damages for negligence of the sheriff in the care of the property. With reference to such damage the sheriff is to be deemed the agent of the attaching plaintiff: *Blane v. Tharp*, 49 N. W. R., 1044; *Ruthven v. Beckwith*, 51 N. W. R., 153.

Where plaintiff's attachment was sued out on the ground that defendant was about to remove from the state, and refused to make arrangements for securing payment of indebtedness, and it appeared that plaintiff through his attorney knew at the time that the proposed sale of defendant's property was for the purpose of paying plaintiff's claim, and was acquiesced in by such attorney, *held*, that defendant was entitled to actual damages for the suing out of the writ, and also to exemplary damages, because of the intentional wrong on the part of plaintiff: *Hurlbut v. Hardenbrook*, 52 N. W. R., 510.

In such case, *held*, that an instruction with regard to failure to take legal advice, as indicating malice, was properly given: *Ibid.*

An attorney's fee may be recovered although only nominal damages are allowed for the wrongful suing out of the attachment: *Lyman v. Lauderbaugh*, 75–481.

If the party entitled to recover attorney fees make no claim therefor until after payment of the judgment and costs, he cannot have the litigation opened up afresh in order to have evidence introduced to enable the court to fix the amount of such fee, and enter up another judgment therefor: *Solomon v. McLennan*, 81–406.

4176. Mode of attachment.

The service of a writ of attachment by an officer *de facto* is valid as to the rights of other persons: *Stickney v. Stickney*, 77–699.

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4178. What property to be attached.

The assignee of property for the benefit of creditors, being an officer of the court, the property in his possession is to be deemed in the possession of the law if the assignment is valid, and in such case a creditor cannot, in a suit against the assignor, attach such property in the assignee's hands: *Hamilton-Brown Shoe Co. v. Mercer*, 51 N. W. R., 415.

Under the facts of a particular case, *held*, that an heir who by the terms of a will was to enjoy the proceeds of a trust created by the will had not such interest in the property of the ancestor which was to be converted into trust funds as to be subject to attachment: *Wilkinson v. Severance*, 80–436.

4181. Levy; notice.

A levy upon goods is not accomplished until defendant has done some act with reference to the property sought to be seized which would but for the writ amount to a trespass: *Hibbard v. Zenor*, 75–471.

Therefore, where an officer went to a store where the goods were kept for the purpose of making a levy, and, finding it closed, left a watchman at the building, while he went to get a key, but, failing to obtain one, returned and broke into the building and took possession of the goods, *held*, that the levy was not effected until the entrance to the building was accomplished, and it would not operate by relation back to the time he first attempted to make an entrance: *Ibid.*

Until the notice required by this provision is given no valid levy can be said to be made. The notice required should be in writing: *Moore v. Marshalltown Opera House Co.*, 81–45.

An indorsement upon the stubs of the stock certificates in the company's office of the fact of levy will not constitute a levy in the absence of the written notice required by statute: *Ibid.*

In a particular case, *held*, that a written transfer of the stock by way of collateral security was sufficient as against notice of a levy subsequently given: *Ibid.*

A levy is invalid in the absence of the notice required by this section, even though it be entered in the incumbrance book: *Sioux Valley State Bank v. Kellog*, 81–124.

Where such fact appears on the record there is no recovery on the attachment bond, and a counter-claim on such bond may be withdrawn from the jury: *Ibid.*

A levy upon corporate stock claimed to belong to the debtor is not valid, where no notice of such levy is given to the debtor as required by the first paragraph of this section: *Commercial Nat. Bank v. Farmers', etc., Nat. Bank*, 82–192.

Therefore a prior transferee of such stock by transfer not made on the books of the company has a better title than the purchaser of the stock at an execution sale in pursuance of an attachment, of which the defendant in the action had no notice: *Ibid.*

The method of reaching shares of stock here provided must be pursued. They cannot be reached by garnishment of one who holds the certificates: *Younkin v. Collier*, 47 Fed. R., 571.

4189. Levying on mortgaged personal property.

Prior to the enactment of this statute chattel property in the hands of the mortgagor, with the right of the mortgagee to possession, was beyond the reach of process by his creditors other than the mortgagee; but a creditor might by garnishment secure the surplus after the payment of the mortgage debt. The provisions of this statute do not give the attaching creditor priority upon paying the amount of the mortgage debt over the preceding garnishment of the mortgagee by another creditor. While the statute enables a creditor by pursuing the method pointed out to obtain a lien upon the property, this is not exclusive of the proceeding by garnishment: *Buck-Reiner Co. v. Beatty*, 82–353.

Prior to this enactment mortgaged property was protected from seizure or lien by attachment or execution. The creditor might proceed by garnishment, but would thereby acquire no right against the property, but only against the garnishee individually to the extent of the surplus: *Blotcky v. O'Neill*, 49 N. W. R., 1029.

Therefore, where tender was made to a mortgagee only after a prior tender by another creditor had been made, and the mortgage assigned to such prior claimant, *held*, that the subsequent claimant thereby acquired no right to the property: *Ibid.*

Also *held*, that where the subsequent claimant took an assignment of the mortgage, he was entitled to possession thereof as against other executions in the sheriff's hands: *Ibid.*

Notwithstanding the provisions of this section the chattel mortgagee must give notice to an officer who has levied upon the property as belonging to the mortgagor before an action of replevin can be maintained to recover possession of the property under such mortgage: *Danforth v. Harlow*, 76–236.

The evident purpose and design of this statute is to give junior creditors the right to subject the property after the payment of the mortgage. It does not dispense with the notice required by § 4280: *Ibid.*

In case the mortgage was executed before the enactment of the statute, the deposit can only be made after the debt secured is due, and the debt secured does not become due merely by virtue of a provision in the mortgage authorizing the mortgagee, whenever he deems himself insecure, to take possession and sell the property: *Deering v. Wheeler*, 76–496.

But where money was deposited in such a case by the execution creditor before the mortgage was due and was accepted by the mortgagee, *held*, that the execution creditor thereby acquired the mortgagee's lien: *Ibid.*

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4192. Contesting validity of mortgage.

The levy of an attachment on mortgaged chattels is not void because of a failure to pay or offer to pay the mortgage debt, where creditors are contesting the validity of the mortgage, and such failure does not affect the requirement that notice of ownership must be served by parties claiming the property: *Hibbard v. Zenor*, 75–471.

A creditor may, under this provision, contest the right of the mortgagee upon any ground that goes to the validity of the mortgage; but before he can do that, he must acquire an apparent lien upon the property by making a levy in accordance with these provisions: *Thomas v. Farley Mfg. Co.*, 76–735.

4195. Notice of ownership; indemnifying bond.

The manner of delivery of the notice is immaterial. It is only essential that it be received by the officer: *Turner v. Younker*, 76–255.

Where objections to the notice appear upon the face of the petition, and are not taken by demurrer or motion in arrest of judgment, they must be deemed waived: *Linden v. Green*, 81–365.

A notice that plaintiff claimed to be owner of a "certain stock of drugs" by virtue of a chattel mortgage, *held* sufficient notice of a mortgage upon the property as a "drug stock:" *Kern v. Wilson*, 82–407.

4200. Garnishment; how effected.

Dependent upon attachment: The authority of the officer to take the answer of the garnishee is dependent upon the writ of attachment, and the written notice mentioned in § 4205 is simply the *præcipe* directing and demanding the discharge of the power conferred and the duty imposed by the statute. The service of garnishment process and the taking of the garnishee's answers are matters pertaining to the execution of the writ: *Kenosha Stove Co. v. Shedd*, 82–540.

To uphold a garnishment it is not necessary that an order be made by the court sustaining the attachment: *Ibid.*

What property reached: To hold a garnishee liable for property it must appear that at the service of the notice he has or has had such property in his possession or under his control: *Kiggins v. Woodke*, 78–34.

Real estate of the debtor, the title to which is in another, cannot be reached by the process of garnishment: *Baxter v. Myers*, 52 N. W. R., 234.

The garnishment of one who has in his possession certificates of stock belonging to the debtor will not create a lien upon such stock. The method pointed out in § 4181 must be pursued: *Younkin v. Collier*, 47 Fed. R., 571.

No lien on personal property can be acquired by process of garnishment, and the rights of a mortgagee whose mortgage was made subsequent to the process of garnishment are not affected thereby: *Booth v. Gish*, 75–451.

The rule that an attaching creditor cannot acquire through his attachment a higher or better right to the property attached than the defendant had when the attachment was levied unless he can show some fraud or collusion by which his rights have been impaired is equally applicable in proceedings by garnishment: *Shaver W. & C. Co. v. Halsted*, 78–730.

In a particular case, *held*, that by garnishment proceedings a creditor had a lien upon proceeds of policies of insurance claimed by the wife of the debtor, and that she could not thereafter make any disposition thereof which would defeat the lien of the creditor on such fund: *Ibid.*

It is only where the debtor of the defendant in execution is garnished that the relation of debtor and creditor exists between the creditor and the garnishee; such relation does not exist by reason of the garnishment of one holding property of the debtor: *Ibid.*

A garnishment in an action by attachment against the firm of S. Bros., *held* not to cover a debt due from the garnishee to the firm of S. & Co., having one member in common with the firm of S. Bros.: *Brumwell v. Stebbins*, 49 N. W. R., 1020.

Where the question was whether the garnishee was the owner of certain property claimed to have been procured for him by the defendant, or whether the property belonged to defendant, and was transferred to the garnishee in fraud of creditors, *held*, that the person from whom the property was originally procured was not a necessary party: *Capital City Bank v. Wakefield*, 48 N. W. R., 1059.

Where a notice of garnishment stated the name of defendant as being "N. Young, or N. S. Young," and on a motion by N. S. Young, to discharge the garnishment, so far as any liability to said N. S. Young was concerned, it appeared that the original action was against N. Young alone, and N. S. Young was not a party thereto, and the motion of N. S. Young in the garnishment proceedings was thereupon sustained, *held*, that such ruling of the court was not an adjudication in subsequent proceedings in the case that N. Young and N. S. Young were not the same person, and that the indebtedness was not due to N. S. Young: *Allison v. Chicago, B. & Q. R. Co.*, 76–209.

Property out of the state: Personal property under the control of the garnishee but situated out of the state where suit is brought cannot be reached by process of garnishment; and this rule is especially applicable to property in the possession of a carrier, and in course of transportation outside of the state: *Montrose Pickle Co. v. Dodson & Hills Mfg. Co.*, 76–172.

It seems that under a garnishment proceeding against a non-resident over whom jurisdiction is acquired while temporarily within the state, the court cannot reach indebtedness which is not in any way connected with any office or agency of the garnishee within the state: *German Bank v. American F. Ins. Co.*, 50 N. W. R., 53.

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But where the garnishee in an action in another state was a corporation which was doing business in such state, and might have been subject to service of process, *held*, that it would be presumed in favor of a judgment against the garnishee in such proceeding that the laws of the state were such as to give the court jurisdiction: *Ibid.*

Proceedings by garnishment are in effect a suit by the defendant in the name of the plaintiff against the garnishee: *Ibid.*

A debt due in another state to a person residing there will be exempt in accordance with the laws of that state, which the courts of this state, although having personal jurisdiction of the person, will recognize: *Mason v. Beebe*, 44 Fed. R., 556.

No lien: A garnishment proceeding creates no lien upon real estate nor upon the rents and profits thereof: *Clark v. Raymond*, 50 N. W. R., 1068.

Garnishment of a chattel mortgagee for the surplus of the property over the amount of the debt secured does not create a lien upon the property, but does create a claim upon the surplus, which takes priority over a subsequent attachment of the property by the payment of the mortgage debt, under the provisions of § 4189: *Buck-Reiner Co. v. Beatty*, 82–353.

4201. Garnishment of executor or administrator.

The current of authorities holds executors and administrators not subject to garnishment until payment of the creditor's claim against the estate has been ordered, or the estate has been fully administered upon, the accounts settled, and an order for distribution made. Then the executor becomes personally liable, and may be served with notice as garnishee in his individual capacity. It is evident that this section was intended to give the right to garnish an executor before such an order, and that he may be garnished as to a legacy or distributive share as well as for a debt due from the estate: *Boyer v. Hawkins*, 52 N. W. R., 659.

An administrator cannot be garnished under a judgment against himself in his individual capacity for money held by him as administrator to which he as an individual is entitled as a distributive share in the estate: *Shepherd v. Bridenstine*, 80–225.

4204. Garnishee to appear and answer.

Delay in taking the garnishee's answer will not be a ground for discharge, as the garnishee can apply to the court at any time, and have his answer taken, if it is found proper to do so: *Boyer v. Hawkins*, 52 N. W. R., 659.

4205. Sheriff may take answers.

The fact that the plaintiff does not give the sheriff written direction to take the answers of the garnishee does not invalidate his acts in taking such answers: *Kenosha Stove Co. v. Shedd*, 82–540.

4211. Delivery of property by garnishee.

The fact that the garnishee is entitled to discharge upon delivery of property in his possession shows that it was not intended to reach by garnishment property outside of the state, and which the garnishee himself must therefore transport at his own expense within the state in order to effect such delivery: *Montrose Pickle Co. v. Dodson & Hills Mfg. Co.*, 76–172.

4212. Answer controverted; trial of issues.

On the trial of the issue in a garnishment proceeding before a jury, a party has a right to a general verdict as in other cases: *Shadbolt & Boyd Iron Co. v. Camp*, 80–539.

Questions of title to real property cannot be determined in a garnishment proceeding wherein it is sought to hold the garnishee for any property of the debtor in his possession: *Wright v. Mahaffey*, 76–96.

4213. Judgment against garnishee.

It is a well-settled rule that liability will never be presumed against a garnishee, but must be affirmatively shown: *Letts-Fletcher Co. v. McMaster*, 49 N. W. R., 1035.

To sustain a judgment against a garnishee upon his answer alone it must clearly appear that the liability exists: *Mason v. Beebee*, 44 Fed. R., 556.

The garnishee is not to be placed in any worse condition than he would have been in had the claim for which he is garnished been enforced against him directly: *Henry v. Wilson*, 51 N. W. R., 1157.

It is not competent on garnishee's answer to have the garnishee made a party defendant on motion: *Reeves v. Harrington*, 52 N. W. R., 517.

The garnishee has such interest in the subject-matter that he may maintain an action to set aside a judgment rendered against him by reason of fraud even though the owner of the money and property which it is sought to reach in his hands is also notified of the garnishment, such owner not being, however, a party to the proceeding in which the garnishment is effected, but a stranger to the judgment which it is sought to enforce by the garnishment: *Searle v. Fairbanks*, 80–307.

Where a garnishee, claiming the proceeds of property as a mortgagee, resisted the garnishment, and was subsequently allowed to retain a sufficient amount to pay the debt covered by the mortgage so far as it was not fraudulent, *held*, that he should not be allowed

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attorney's fees on his claim nor interest thereon after the time of the garnishment: *Southern White Lead Co. v. Haas*, 76–482.

Where judgment is rendered against the defendant, the court will take judicial notice thereof, and that plaintiff is therefore a creditor of the defendant: *Kenosha Stove Co. v. Shedd*, 82–540.

While an unconditional judgment against the garnishee should not be rendered until judgment is rendered against the defendant, the court may properly enter against the garnishee a judgment which will hold the debt or property pending the final adjudication. And in determining the question as against the garnishee, it is not necessary to submit to the jury the question whether plaintiff is entitled to judgment against the defendant: *Capital City Bank v. Wakefield*, 48 N. W. R., 1059.

4218. Appeal in garnishment proceedings.

The provisions of § 4244, as to the time allowed for appeal after the discharge of an attachment, are applicable also in cases of garnishment: *Farwell v. Tiffany*, 82–405.

4219. Release of attached property.

Where the parties in an attachment suit agreed upon a settlement and directed the sheriff to release the attached property, *held*, that the sheriff could not afterwards be held liable because of the failure of the defendant to perform his part of the agreement: *Melhop v. Seaton*, 77–151.

And evidence tending to establish the agreement for settlement and discharge of the attachment *held* not a contradiction of the officer's return and properly admitted: *Ibid.*

And the order in the attachment case directing the attached property to be sold to satisfy the judgment, *held* not to estop the sheriff from showing that he released it upon the agreement, as he was not a party to that case: *Ibid.*

4221. Delivery bond.

The provision as to the filing with the clerk is directory and does not affect the validity of the bond. Moreover, unless the contrary appears, it will be presumed that the officers did their duty: *New Haven Lumber Co. v. Raymond*, 76–225.

The execution of a bond and the release of property thereunder must be regarded as a waiver of any claim that the property is not subject to attachment: *Ibid.*

In an action on such bond it is not necessary to show that the attachment was specially confirmed by the judgment in the cause in which it was issued: *Ibid.*

Where a counter-claim for damages on the bond is brought in the original suit, and damages for the wrongful suing out of the writ are deducted from the plaintiff's recovery, the attachment is not dissolved, but the plaintiff is entitled to hold the property to satisfy his judgment: *Cole v. Smith*, 50 N. W. R., 54.

Where a sheriff levied an execution in favor of plaintiff on certain personal property of defendants, and they gave a bond for the delivery of the property, but afterwards brought suit against the sheriff for possession, in which the sheriff recovered judgment for its value, and the judgment was paid to plaintiff, but it was not sufficient to satisfy the judgment, *held*, in an action on the delivery bond, that plaintiff was entitled to recover only nominal damages: *Stuart v. Trotter*, 75–96.

4235. Sheriff's return; disposition of property.

Jurisdiction is acquired over property by a levy. If it is valid, a defective return will not invalidate the proceedings: *Buck-Reiner Co. v. McCoy*, 52 N. W. R., 514.

Thus where the writ ran against two defendants, and the return showed the levy upon certain property as the property of one of them, whereas it was in fact the property of both, *held*, that it would be given effect as a levy upon the property of both, notwithstanding the return: *Ibid.*

The words "duly served" on an appearance docket in regard to a writ of attachment, *held* properly excluded from evidence in view of the requirement that the facts constituting the service shall be stated in the return: *Benjamin v. Shea*, 49 N. W. R., 989.

Where the sheriff under writ of attachment levied upon personal property, consisting of carpets, furniture, etc., used in a hotel, and allowed the same to be further used in the operation of the hotel, it appearing that the property would have been greatly damaged by removal, and that its storage elsewhere would have been attended with considerable expense, *held*, that no damage to the owner of the property appearing, he could not recover against the sheriff for the conversion of the property: *Elter v. O'Neil*, 49 N. W. R., 1013.

4236. Judgment how satisfied; special execution.

Where a judgment was rendered for plaintiff in attachment after deducting from his claim the amount allowed defendant on a counter-claim on the bond for the wrongful suing out of the writ, *held*, that the property should not be discharged, but should be applied to the satisfaction of such judgment: *Cole v. Smith*, 50 N. W. R., 54.

The provisions of § 4281 as to the liability of officers in levying execution apply to special as well as general executions: *Bank of Reinbeck v. Brown*, 76–696.

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4240. Discharge of property.

Where a judgment was rendered for plaintiff in an attachment after deducting from his claim the amount allowed defendant on a counter-claim on the bond for the wrongful suing out of the writ, *held*, that the property should not be discharged, but should be applied to the satisfaction of such judgment: *Cole v. Smith*, 50 N. W. R., 54.

4241. Intervention of party claiming property.

The provisions of § 4244 as to the time when an appeal must be taken after an order dissolving an attachment, in order to preserve such attachment, are applicable to orders made under this section: *Ryan v. Heenan*, 76-589.

4243. Discharge on motion.

If the property is not discharged on motion but defendant recovers damages by way of counter-claim for the wrongful suing out of the writ, he is not entitled to the discharge of the property after judgment for plaintiff for the balance of the claim after the deduction of the defendant's damages, but the property should be held to satisfy such judgment: *Cole v. Smith*, 50 N. W. R., 54.

4244. Time for appeal to save attachment.

Where there is a judgment against the plaintiff in an attachment case, the judgment operates to dissolve the attachment without any further order of the court, unless appeal is taken within two days after the rendition of judgment; and where such a case is remanded for new trial, which results in a judgment for plaintiff, it is error to issue a special execution for the sale of the attached property: *McCormick v. Jacobson*, 77-582.

As an appeal is not perfected until notice is served on the clerk and his fees for transcript have been paid or secured, and as the *supersedeas* bond does not operate to secure the clerk's fees, *held*, in a particular case, that money for which the clerk had been garnished in an attachment proceeding was released by reason of proper steps not having been taken within the time specified: *Peterson v. Hays*, 51 N. W. R., 1143.

The provision of this section as to the time for perfecting an appeal from a ruling discharging the attachment so as to preserve such attachment is applicable to an order made under the provisions of § 4241 on an application of a third person claiming a lien upon or interest in the attached property: *Ryan v. Heenan*, 76-589.

The provisions of this section apply to attachment by garnishment: *Farwell v. Tiffany*, 82-405.

An appeal in an action to recover possession of personal property against an officer claiming to hold it under an attachment is not governed by the provisions of this section: *Linden v. Green*, 81-365.

4245. Appeal from judgment against plaintiff.

An appeal may be taken from an order discharging an attachment as well as from a final judgment, and this section is designed to compel plaintiff to take his appeal from the judgment within the time within which he is required to perfect his appeal from the order. It is not designed to apply to any case in lieu of the preceding section, but to add to its requirements when judgment has been rendered against the plaintiff: *Peterson v. Hays*, 51 N. W. R., 1143.

4246. Liberal construction; amendments.

Recitals in a writ that the petition was filed in the circuit court, when in fact the petition was filed in the district court, and the writ was under the seal of that court, *held* to be such defect as could be cured by amendment: *Rock Island Plow Co. v. Breese*, 49 N. W. R., 1026.

Where a county had no engraved seal and a scroll was used, the writ reciting the facts, *held*, that the writ was valid: *Conklin v. Wehrman*, 43 Fed. R., 12.

4247. Entry on incumbrance book.

It seems that the weight of authority supports the rule that when the attachment creditor shows the existence of the indebtedness for which the attachment is issued, and the issuance, levy and return of the writ, and the neglect of the clerk by which the lien of the attachment was lost, a *prima facie* case is made against the clerk for the recovery of the full amount of the debt, unless the clerk can show that the property attached was of less value than the amount of the debt or that the attachment defendant had no interest in it: *Benjamin v. Shea*, 49 N. W. R., 889.

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CHAPTER 2.

EXECUTIONS.

4250. Limitation on issuance of.

The pendency of a *mandamus* proceeding to enforce payment of a judgment does not prevent the right to execution thereon from terminating at the end of twenty years: *McAleer v. Clay County*, 42 Fed. R., 665.

4256. Transcript of judgment in another county.

The powers of the clerk with reference to transcripts of judgment rendered in another county and filed in his office are only those prescribed by this section. He is not authorized to receive payment of or satisfy the judgment, and a return of the sheriff reciting satisfaction of the execution by payment of the amount of the judgment to the clerk of the county where the transcript is filed does not show satisfaction: *Hawkeye Ins. Co. v. Luckow*, 76-21.

4258. General; special.

The provisions of § 4280 as to the liability of officers in levying execution apply to special as well as general executions: *Bank of Reinbeck v. Brown*, 76-696.

Where there was a judgment for the sale of pledged property in satisfaction of the pledged debt, but such sale was made by mistake under a general execution instead of under a special execution, *held*, that the pledgee did not thereby lose his lien, and that the purchaser was entitled to be considered an innocent purchaser free from equities: *Valley Nat. Bank v. Jackaway*, 80-512.

Under a particular decree providing for special execution in favor of different parties, *held*, that execution in favor of one did not exhaust the remedy of the other: *Beavans v. Dewey*, 82-85.

4263. Indorsement; return.

Where a sheriff's return of execution under which a homestead with other land was sold showed that the land was offered for sale in separate parcels but did not show which parcel was offered first, *held*, that the parol testimony of the sheriff was admissible to show the fact, which did not appear on the return: *Smith v. De Kock*, 81-535.

Where, subsequently to the making of an assignment of a contract to convey land, an execution against the assignor was returned *nulla bona*, *held*, that such return did not give rise to a presumption of insolvency against the assignor at the time the assignment was made: *Belden v. Younger*, 76-567.

A paper purporting to be an execution, not bearing the clerk's seal or filing mark, and not otherwise identified, but found with the papers in the case, *held* properly excluded as evidence: *Benjamin v. Shea*, 49 N. W. R., 989.

4264. Against principal and surety.

Where a mortgage given for the deed of the husband covered land of the husband and also land of the wife, the tract belonging to the husband being the homestead, *held*, that although the wife was surety only, yet under § 3168, providing that in such cases the property not the homestead should be first exhausted, a release by mortgagor of the wife's land, the value of which was greater than the amount of the debt, would prevent the foreclosure of the mortgage against the homestead: *Bockholt v. Kraft*, 78-661.

4267. Order of liability fixed by judgment.

One who is made a party to a suit to foreclose a mortgage given to secure a note signed by such person as surety is bound by the adjudication as to his relation to the note and rights of priority as to the property to be resorted to for the satisfaction of the judgment: *Case v. Hicks*, 76-86.

4269. Levy; what acts necessary.

To hold an officer liable for failing to perform his duty in the matter of levying upon and holding property on execution, it should appear that the property levied upon belonged to the execution defendant, and was subject to levy; that it was lost because of the officer's negligence, stating the facts constituting such negligence; and that plaintiff suffered injury because thereof: *Hawkeye Lumber Co. v. Diddy*, 51 N. W. R., 2.

Where a sheriff levied an execution in favor of plaintiff on certain personal property of defendants and they gave a bond for the delivery of the property, but afterwards brought suit against the sheriff for the property, in which the sheriff recovered judgment for the value of the property, and the judgment was paid and the money turned over to plaintiff, but it was not sufficient to satisfy the judgment, *held*, in an action on the delivery bond, that plaintiff was entitled to recover only nominal damages: *Stuart v. Trotter*, 75-96.

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4274. Tax levied to pay corporate debt.

The right to the issuance of a *mandamus* to compel payment of a judgment by a public corporation is based upon the fact that there exists in favor of plaintiffs an operative and enforcible judgment against the defendant; and if during the pendency of the action the twenty years within which the right of execution on the judgment expires, the right to relief is terminated: *McAleer v. Clay County*, 42 Fed. R., 665.

4280. Indemnifying bond; when required; notice.

The notice contemplated by this section must be given before the claimant to the property under a chattel mortgage can maintain an action of replevin to recover the possession of the same: *Danforth v. Harlow*, 76–236.

An action against a sheriff to recover property taken on execution cannot be maintained unless the notice here provided for has been given: *Doolittle v. Hall*, 78–571.

The notice should describe the property so that the officer will be able to identify it, and a notice applying to all property upon certain tracts of land is not good when it does not allege ownership of all such property: *Ibid.*

Where property levied on under execution was claimed by chattel mortgagee and subsequently an indemnifying bond was given, *held*, that an assignee of the claim for damages under the bond did not have such interest as to be entitled to bring action without an assignment of the mortgaged indebtedness: *Garretson v. Ferrall*, 78–166.

The provisions of this section apply to levies under special execution as well as under general execution: *Bank of Reinbeck v. Brown*, 76–696.

The time for bringing action against an officer for damages in the wrongful levy of an execution commences to run from the time notice of ownership of the adverse claimant is served: *Ibid.*

4286. Stay of execution.

The time of the stay commences to run from the rendition of the judgment, and not from the time of filing of the bond: *Okey v. Sigler*, 82–94.

4293. Objection by surety.

While it may be competent for the parties to have a provision for stay of execution inserted in the judgment, which shall be binding on the sureties, who are parties to the suit, and against whom judgment is rendered, the rule will not apply to the case of a surety against whom judgment is rendered by default, before the conclusion of the suit and rendition of judgment against the principal. In such a case, after the default, the surety ceases to be a party to the suit in such sense as to be bound by subsequent proceedings: *Okey v. Sigler*, 82–94.

Even though there is an agreement by virtue of which the allowance of a stay of execution would not release the surety, yet the surety would be released if the stay granted in such case should be for a longer time than that allowed by statute: *Ibid.*

4297. Property exempt from execution.

Where the debtor was engaged in selling illuminating oil, such sales being for the most part made from a tank wagon, sometimes driven by the debtor but generally by his minor son, some few sales being made, however, at the room where the oils were kept, *held*, that the wagon and team used in the delivery were exempt: *Consolidated Tank Line v. Hunt*, 48 N. W. R., 1057.

It is not material in such case that the living of the debtor is not wholly earned by the use of the team and wagon, nor that the team is used for him by another: *Ibid.*

Where a husband sold the team, wagon and harness, exempt in his hands as a farmer, to his wife, and went out of the business of farming, *held*, that the sale was effectual as against creditors: *Pearson v. Quist*, 79–54.

The proceeds of a policy of insurance on exempt property, such as the books of a physician, are also exempt from execution: *Reynolds v. Haines*, 49 N. W. R., 851.

A waiver of exemption laws cannot be effectually made in a lease so as to subject exempt property to the landlord's lien. Such a provision, if valid, must be sustained as a chattel mortgage: *Sioux Valley State Bank v. Honnold*, 52 N. W. R., 244.

4299. Exemption of personal earnings.

It is error to instruct the jury with reference to the right of the husband to give his exempt earnings to the wife, where there is no issue of that kind, and the sole question is as to the right of the creditor to such earnings: *King v. Bird*, 52 N. W. R., 494.

4305. Pension money.

Property purchased with pension money is exempt from execution by virtue of the federal statute. (Overruling *Webb v. Holt*, 57–712; *Tripplett v. Graham*, 58–135; *Baugh v. Barrett*, 69–495; *Farmer v. Turner*, 64–690; *Foster v. Byrne*, 76–295): *Crow v. Brown*, 81–844.

Pension money received after the taking effect of this act cannot be appropriated by the court, in administering the estate of an insane pensioner, to the payment of expenses already incurred by the county in support of such pensioner, whether incurred before or after the taking effect of this section. Whether

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such pension money could be appropriated by an order providing for expenses to be thereafter incurred, *quære: Fayette County v. Hancock*, 49 N. W. R., 1040.

The provisions of this section exempt animals purchased with pension money, but not the increase of such animals; but *held*, that pension money used in paying for the services of a stallion would constitute an exemption to the extent of the money so paid in the colts foaled by mares purchased with pension money served with stallions whose services were thus paid for: *Diamond v. Palmer*, 79-578.

Where the pensioner paid the entire purchase price of a horse with pension money, and afterwards exchanged such horse for another, without any additional payment of money, *held*, that the horse thus acquired remained exempt, although his value was in excess of that of the pension money invested in his first horse: *Smith v. Hill*, 49 N. W. R., 1043.

This statutory provision, exempting from execution property acquired with pension money, does not apply as against debts contracted prior to the passage of the statute. In that respect the statute is unconstitutional, as impairing the obligation of contracts: *Foster v. Byrne*, 76-295.

4307a. Wages preferred claims. 23 G. A., ch. 48. Hereafter, when the property of any company, corporation, firm or person shall be seized upon by any process of any court of this state; or when their business shall be suspended by the action of creditors or be put into the hands of a receiver or trustee, then in all such cases, the debts owing to laborers or servants, which have accrued by reason of their labor or employment to an amount not exceeding one hundred dollars to each employee for work or labor performed within ninety days next preceding the seizure or transfer of such property, shall be considered and treated as preferred debts and such laborers or employees shall be preferred creditors, and shall first be paid in full; and if there be not sufficient to pay them in full, then the same shall be paid to them *pro rata* after paying costs. Any such laborer or servant desiring to enforce his or her claim for wages under this act shall present a statement under oath showing the amount due after allowing all just credits and set-offs, the kind of work for which such wages are due, and when performed, to the officer, person or court charged with such property within ten days after the seizure thereof on any execution or writ of attachment, or within thirty days after the same may have been placed in the hands of any receiver or trustee; and thereupon it shall be the duty of the person or court receiving such statement to pay the amount of such claim or claims to the person or persons entitled thereto (after first paying all costs occasioned by the seizure of such property) out of the proceeds of the sale of the property seized; *Provided* that any person interested may contest any such claim or claims or any part thereof by filing exceptions thereto, supported by affidavit, with the officer having the custody of such property and thereupon the claimant shall be required to reduce his claims to judgment before some court having jurisdiction thereof, before any part thereof shall be paid.

4311. Execution sale; time and manner; setting aside.

A deed under an execution sale will not be set aside, because of an omission to plat the homestead, where a notice is served upon the sheriff by the owner reserving a definitely described tract of land as the homestead: *Smith v. De Kock*, 81-535.

Where it appeared by the return that each parcel was offered separately without bids therefor and that then all the parcels were offered and sold together, *held*, that the sale was valid: *Lamb v. McConkey*, 76-47.

If lands cannot be sold in separate tracts for want of bidders, it is proper to sell them *en masse: Connecticut Mut. L. Ins. Co. v. Brown*, 81-42.

Under the circumstances of particular cases, *held*, that the showing of fraud on the part of the execution creditor and gross inadequacy of consideration was such as to warrant the setting aside of sheriff's deeds: *Sioux City, etc., Land Co. v. Walker*, 78-476; *Lehner v. Loomis*, 49 N. W. R., 1018.

4317. Plan of division.

This section is intended to secure sales in separate tracts as defendant shall direct, but is not intended to defeat sales. It must be so construed that if the lands cannot be sold in separate tracts for want of bidders, they may be afterwards offered and sold *en masse*, and such a sale is not *per se* void or voidable. The fact that no bids were made when the land was offered in separate tracts, and it was therefore sold *en masse*, raises a presumption that the land is more valuable when taken together, or at least that defendant in execution suf-

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fered no prejudice by the sale: *Connecticut Mut. L. Ins. Co. v. Brown*, 81–42.

If there is no evidence as to whether the land would sell for a better price *en masse* or separately, it will be presumed on a motion to set aside the sale that the defendant suffered no prejudice in a sale *en masse*: *Ibid.*

4330. Redemption; certificate of sale.

The holder of a sheriff's certificate of sale is only a lienholder, and is a proper but not a necessary party to proceedings to foreclose a senior mortgage, and the execution of the sheriff's deed does not divest the liens of senior mortgages, although they can be enforced only after the rights of the owner have been adjudicated in the manner provided by law: *Stanbrough v. Daniels*, 77–561.

4331. Redemption by defendant.

The right of possession during the period of redemption is in the nature of a stay law, and courts ought to require a very clear showing that it has been bargained away before depriving the debtor thereof: *Swan v. Mitchell*, 82–307.

Where there was no agreement to that effect in the mortgage, *held*, that it was improper to appoint a receiver to take possession of the mortgaged property during the period of redemption and thus deprive the mortgagor of the rents and profits: *Ibid.*

Where the holder of a junior mortgage buys the premises under a foreclosure of his mortgage, he purchases subject to prior liens, and he is not bound to see that the premises are sold for an amount sufficient to satisfy those liens, but he may afterwards take an assignment of the senior mortgage and foreclose it and sell the land thereunder: *Herrick v. Tallman*, 75–441.

The grantee of an execution debtor, who acquires the interest of his grantor after the right of a junior lienholder to redeem is barred by lapse of time, may himself redeem without subjecting the property to the claims of such junior lienholder: *Moody v. Funk*, 82–1.

Where redemption was made by the surviving widow, who was also grantee of the heirs of the deceased execution debtor, *held*, that such redemption cut off the lien of a junior incumbrancer who was a party to the action: *Beavans v. Dewey*, 82–85.

Where land is sold under a judgment against both principal and surety, the surety may redeem from the sale and thus acquire the judgment for his own protection: *Bleckman v. Butler*, 77–128.

4332. Redemption by creditor.

Where sale is had under decree of foreclosure and subsequently to the expiration of the period for redemption from such sale judgment is rendered against a lienholder who was made party to the original action, such lienholder has only the right to redeem within the statutory period after the judgment against him, and cannot after the expiration of such period maintain an action in equity against grantees of the purchaser at foreclosure sale who have improved the property to redeem from such sale: *Lindsey v. Delano*, 78–350.

A junior lienholder who fails to exercise his right to redeem within the statutory period cannot afterwards defeat the right of the purchaser, or holder of the certificate of purchase, to a deed: *Bleckman v. Butler*, 77–128.

4333. Who deemed creditor.

Where land was sold under execution, and before the time for redemption expired certain mortgages were corrected so as to become a lien on the land, *held*, that the mortgagees had a right to redeem, but as they failed to avail themselves of this right and intimated no desire to redeem, until after a sheriff's deed had been issued to the purchaser under the execution sale, there were no circumstances which would justify an extension of the time for redemption even though it should be conceded that the power to make such extension existed: *Eltenheimer v. Northgraves*, 75–28.

One who has a claim against an estate which has not been allowed by the court is not a creditor in such sense as to be entitled to redeem from execution sale: *Byer v. Healy*, 50 N. W. R., 70.

In a foreclosure proceeding it may be stipulated between the parties that the sale shall be without redemption, and title under such sale will thereupon pass free from the claims of any creditors who have not liens upon the property: *Cook v. McFarland*, 78–528.

The right of the holder of a judgment to redeem from a sale under a prior mortgage is absolutely barred in ten years from the date of the judgment: *Albee v. Curtis*, 77–644.

The general statute of limitations is not applicable to judgment liens, and the fact that the purchaser under the foreclosure was a non-resident would not extend the period of redemption: *Ibid.*

4335. Terms of redemption.

Where the holder of a junior mortgage, more than six and less than nine months from the date of the sale under the senior mortgage, buys in the certificate of sale, and files an affidavit with the clerk stating the amount of his lien and that he has redeemed as a junior lienholder, such redemption is legal, and the owner of the land, with knowledge of the facts, cannot effect redemption without paying the amount of both mortgages: *Lamb v. West*, 75–399.

Where parties, under the mistaken notion that they had a right to do so, sought to redeem property from execution sale, and the

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holder of the certificate directed them to pay the money to the clerk, which they did, *held*, that such action amounted to an equitable assignment of the certificate to the person making payment: *Gilbert v. Husman*, 76–241.

Where money was received by the holder of a certificate under the mistaken belief that the party paying such money was entitled to redeem, and was subsequently returned to the clerk immediately upon discovering the mistake, *held*, that the transaction did not amount to an equitable assignment of the certificate: *Byer v. Healy*, 50 N. W. R., 70.

4344. Entry of amount of credit.

The holder of a certificate of redemption may, after the expiration of the nine months, give to the other lienholders, within the time limited, an opportunity to redeem, by paying less than the full amount of his claim, and at the same time retain a portion of said claim as against the holder; but unless he thus indicates the amount he is willing to allow on his claim for the property, no other lienholder has any right to redeem from him: *Tharp v. Forrest*, 76–195.

The right to have the claim of a redeeming creditor recorded as satisfied on his failure to enter the amount he is willing to credit upon his judgment does not operate as a satisfaction of such judgment as against a party who has obligated himself to save the redeeming creditor entirely harmless from the prior lien: *Montpelier Savings Bank v. Arnold*, 81–158.

4345. Further redemption.

A lien creditor has no right to redeem after the expiration of nine months from the date of sale, unless the redeeming creditor who then holds the right to the property indicates, within the time and in the manner provided by § 4344, the amount he is willing to allow on his claim for the property: *Tharp v. Forrest*, 76–195.

4353. Sheriff's deed.

A sheriff's deed under execution for costs which have already been satisfied under a prior execution which has not been returned is not valid: *Soukup v. Union Inv. Co.*, 51 N. W. R., 167.

A sale under a void judgment cannot be validated by a recital in the sheriff's deed that the defendant elected to have said real estate sold subject to redemption: *Cassidy v. Woodward*, 77–354.

The doctrine of *caveat emptor* applies to purchasers at sheriff's sales: *Jones v. Blumenstein*, 77–361.

The delivery of the sheriff's deed vests in the purchaser ownership of the premises and of the crops then growing thereon and the right of immediate possession, and the tenant in possession under a title inferior to that under which the deed is issued becomes liable to account for the rent accruing and the crops growing after the purchaser becomes entitled to possession under his deed: *Stanbrough v. Cook*, 49 N. W. R., 1010.

As between a purchaser at foreclosure sale and the tenant of the mortgagor, the tenant is entitled to crops grown by him on the premises and already matured but not severed at the time of the sale: *Richards v. Knight*, 78–69.

In a particular case, *held*, that a crop of corn was so far matured in August as to be the property of the tenant within the foregoing rule, it appearing that the season was an unusually early one: *Ibid.*

4362. Execution after death of defendant.

The statute plainly implies that an execution issued after the death of the defendant shall not operate on him or his property, and sales based on such an execution are void. The fact that the property levied on under the execution was already held by the sheriff under writ of attachment levied before the death of the judgment debtor will not affect the rule: *Bull v. Gilbert*, 79–547.

This rule is applicable to personal judgments and to judgments *in rem;* and where the judgment was rendered in an attachment proceeding in which the court acquired jurisdiction only as against the property, the defendant being a non-resident, and it appeared that the execution for the sale of the property was issued after the death of such defendant, *held*, that a sale thereunder was void, and a deed in pursuance of such sale conferred no title: *Ibid.*

CHAPTER 3.

PROCEEDINGS AUXILIARY TO EXECUTION.

4364. Defendant examined.

This and the following sections contain no provision for making third persons parties to the proceedings, and where the defendant's wife, who was not a party to the proceeding, was ordered to appear before the referee and was examined and certain property which was in her possession and which she claimed to own was ordered to be applied to satisfy

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the judgment, *held*, that such order did not appropriate the property and was not binding upon the wife: *Osborne v. Reardon*, 79–175.

These sections of the statute are not unconstitutional: *Ibid.*

When the property is known, or has been discovered, the plaintiff does not need the aid of this statute, but may subject the property to the payment of his judgment by the levy of an execution, and the person directed to turn over property in such proceedings cannot be punished for contempt in disobeying such order, unless such disobedience consists of some act which would hinder or delay the taking possession of the property: *Reardon v. Henry*, 82–134.

The fact that proceedings under this section are conducted as though under an equitable action for subjecting property will not affect the result: *Estey v. Fuller Implement Co.*, 82–678.

In such proceedings, security for costs cannot be required: *Ibid.*

Such proceeding is not abated by an equitable action under § 4379: *Ibid.*

One who is not a party to the case is not concluded by an order made in this proceeding for the payment of money. Such an order is a protection to such third party in turning over property, or paying money, but it is not obligatory: *Ibid.*

4369. Disposition of property.

An order that property be delivered up, or in any other mode applied to the satisfaction of the judgment, should not be made where the ordinary processes of law are adequate for the subjection of the property to the payment of the debt: *Reardon v. Henry*, 82–134.

4374. Punishment for failure to obey order of court.

The provision authorizing the arrest of a debtor is not in violation of the constitutional right to trial by jury: *Marriage v. Woodruff*, 77–292.

Where there is no effort to conceal property or otherwise to prevent its being taken for the satisfaction of indebtedness, the person in whose hands the property is discovered should not be punished for contempt in disobeying an order to turn it over: *Reardon v. Henry*, 82–134.

The provisions of this section do not apply to the refusal of a third person to deliver property and pay money under such an order. A third person, not a party to the proceeding, is not bound by the order, but such an order is binding upon the judgment debtor: *Estey v. Fuller Implement Co.*, 82–678.

4377. Warrant of arrest.

A referee appointed by the court to examine a judgment debtor in proceedings auxiliary to execution may issue a warrant for the arrest of the debtor in case the latter refuses to appear in response to the order: *Marriage v. Woodruff*, 77–292.

4379. Equitable proceedings.

Where an execution is issued, and returned "no property found," it is a sufficient basis for and warrants a proceeding in equity to determine the nature of the defendant's interest in real estate, and subject such interest to the payment of the judgment: *McCormick, etc., Co. v. Gates*, 75–343.

By the provisions of this section, an action by equitable proceedings to subject property to the payment of a claim can only be maintained after judgment has been recovered on such claim: *Faivre v. Gillan*, 51 N. W. R., 46.

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TITLE XIX.

PROCEEDINGS TO REVERSE, VACATE, OR MODIFY JUDGMENTS, OR THE PROCEEDINGS OF BOARDS OR INDIVIDUALS ACTING JUDICIALLY.

CHAPTER 1.

PROCEEDINGS TO REVERSE, VACATE, OR MODIFY JUDGMENTS IN THE COURTS IN WHICH RENDERED.

4383. Grounds for.

Where a motion for a new trial was made more than three days after judgment was rendered, but contained an averment in which it was described as a petition, and contained statements and demands for relief which would be proper in a petition, *held*, that the motion was sufficient; and even if it had been objected to in the court below, the objection might have been overruled and the application treated as if by petition: *Council Bluffs L. & T. Co. v. Jennings*, 81-470.

Where a default was entered upon an amended petition, on the last day of the term and just before adjournment, and it appeared that the case had not been entered on the calendars, and counsel for defendant had no notice that it would be called up, *held*, that the judgment might be set aside on motion at a subsequent term: *Walker v. Freelove*, 79-752.

Where defendants and their attorney resided at a distance from the place of holding court, and plaintiff's attorney had agreed with the attorney of defendant that the case should be continued, and not called for trial without notice to defendant's attorney, and where the case was afterwards called without such notice and judgment entered against defendant, *held*, that defendant were not so negligent as to be debarred from a new trial and the court did not err in granting it: *Council Bluffs L. & T. Co. v. Jennings*, 81-480.

Action of the court on application to set aside a judgment by default on the ground of casualty and misfortune, which has prevented defense being made, is largely discretionary, and the supreme court will not, on appeal, interfere, except in peculiar cases of abuse: *Callanan v. Ætna Nat. Bank*, 50 N. W. R. 69.

Although proceedings under this section are to be by petition instead of by motion, yet where no objection is made in the lower court to the proceeding by motion, it will be treated as regular on appeal: *Ibid.*

In a particular case, *held*, that the showing of the sickness of the defendant's attorney was such as to entitle the defendant to have a judgment against him by default set aside: *Ibid.*

It is not required that the court shall find the defense established by a preponderance of the evidence before granting a new trial. If there is a reasonable ground to believe that a different result will be reached by a new trial, that is sufficient showing of a valid defense: *Clark v. Ellsworth*, 51 N. W. R., 31.

Courts of equity have jurisdiction to grant relief against a judgment obtained by fraud in cases where the fraud is not, and by the exercise of reasonable diligence could not have been, discovered by the party defrauded, until after the expiration of the time allowed in the statute for retrial: *Ibid.*

An action in equity to set aside a judgment is not available to a party for errors of the court not affecting the jurisdiction which might have been corrected on motion or appeal: *Geyer v. Douglass*, 52 N. W. R., 111.

The fact that a party brings his action in equity to set aside a judgment for fraud, when relief might have been obtained under these sections, is not a ground of demurrer: *Searle v. Fairbanks*, 80-307.

The action of the attorney for plaintiff in a garnishment proceeding in taking judgment against the garnishee after he has been advised that the money and property in the garnishee's hands belong to another person of the same name as plaintiff, and whom the garnishee at first supposed to be the same person as plaintiff, and has agreed to drop any further proceedings against the garnishee, and without notice to him, will constitute fraud authorizing the setting aside of the judgment. Such fraud not having arisen until such judgment was obtained, presents a case for equitable relief from the judgment: *Ibid.*

An appeal may be taken from a ruling of the court on a petition for a new trial filed under this section within proper time after such ruling, although more than the specified time for appeal after the rendition of the original judgment: *Wishard v. McNeil*, 78-40.

Where it appeared that the original judgment was by default due to the failure of defendant's attorney to interpose a defense, such failure being caused by a severe illness which rendered it impossible for him to attend to any business, and the party himself was away and had no knowledge that the attorney was not able to attend to the case, *held*, that a sufficient showing for setting aside the judgment was made: *Ibid.*

In a particular case, *held*, that the petition for new trial showed a meritorious defense to the action: *Ibid.*

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4384. Petition for new trial.

The trial is not to be had upon affidavits, but upon evidence introduced as in other cases: *Mortell v. Friel*, 52 N. W. R., 513.

In an application for a new trial under this section, only errors assigned and argued will be considered on appeal, and when the evidence on which the ruling is made in the lower court is conflicting, the supreme court will not interfere: *Kruidenier v. Shields*, 77-504.

4388. Valid defense.

The judgment is not to be vacated until a retrial is had, and this provision is applicable to the new trial authorized by § 4084: *Stanbrough v. Cook*, 49 N. W. R., 1010.

CHAPTER 2.

APPELLATE PROCEEDINGS IN THE SUPREME COURT.

4392. From what, appeals taken.

Jurisdiction: The supreme court has no original jurisdiction and cannot, after the dismissal of a case in the lower court pending an appeal, retain jurisdiction of the case for the purpose of assessing damages on an injunction bond: *Chicago, R. I. & P. R. Co. v. Dey*, 76-278.

As a rule the supreme court has appellate jurisdiction over all judgments and decisions of other courts of record in the state, and where it does not appear that the case falls within the limitations as to the amount in controversy, jurisdiction will be assumed to exist in that respect: *Farley v. Geisheker*, 78-453.

In the absence of any objection based upon the want of jurisdiction in equity, by reason of the fact that there is a plain, adequate and complete remedy at law, the supreme court will, upon its own motion, raise the objection: *Keokuk & N. W. R. Co. v. Donnell*, 77-221.

The jurisdiction of the supreme court is supervisory: *In re Bresee*, 82-573.

From judgment: An appeal cannot be taken from a verdict by a jury where the record fails to show that a judgment has been entered: *Jones v. Givens*, 77-173.

The supreme court has no jurisdiction to determine a question appealed by consent of parties, when there has been no decision by the lower court: *Bills v. Bills*, 77-179.

A party has the right to appeal from a definite and specified portion of the judgment: *Andrew v. Concannon*, 76-251.

In an equity case triable *de novo*, an appeal may be taken from a distinct and specified portion of the judgment: *Gleiser v. McGregor*, 52 N. W. R., 866.

Party not appealing: One who has not appealed cannot urge errors in the action of the court, and cannot claim that, if such errors had not been committed, the error of which the other party complains would not have resulted: *First Nat. Bank v. Wright*, 48 N. W. R., 91 (on rehearing, 50 N. W. R., 23); *Bellows v. Litchfield*, 48 N. W. R., 1062; *Fisk v. Chicago, M. & St. P. R. Co.*, 48 N. W. R., 1081.

A party not appealing can have no relief: *Miller v. Schenck*, 78-372; *Hanks v. Brown*, 79-560; *Rainwater v. Hummell*, 79-571; *Matthews v. Cedar Rapids*, 80-459.

A party who does not appeal must be regarded as having acquiesced in the judgment of the lower court: *Pace v. Heinley*, 52 N. W. R., 124.

Where the court rendered judgment for less than the amount of the verdict, *held*, that the party against whom the verdict was rendered could not complain of the error: *Deere v. Wolf*, 77-115.

A party who does not appeal cannot have, in an equity case, any more favorable decree in the appellate court than he had in the court below: *Charlton v. Sloan*, 76-288.

Waiver of right: Performance of the judgment will waive an appeal therefrom: *Hintrager v. Mahoney*, 78-537.

Acceptance by plaintiff's attorney in a prosecution under the liquor law, of the amount taxed in favor of plaintiff as attorney's fees, *held* a waiver of the plaintiff's right to appeal: *Root v. Heil*, 78-436.

Where a party voluntarily caused execution to be issued and property to be sold in satisfaction of the judgment, *held*, that he thereby waived his right to further contest the correctness of the amount of recovery: *Anglo-American Land, etc., Co. v. Bush*, 50 N. W. R., 1063; *Lombard v. Bush*, 50 N. W. R., 1068.

Where, in an action against a county to recover fees in criminal cases, some of the items of plaintiff's claim were disallowed and plaintiff thereupon appealed from the portion of the judgment adverse to him, *held*, that the acceptance of the fees allowed by the lower court was not a waiver of such appeal: *Byram v. Polk County*, 76-75.

Where the judgment involved the possession of real estate, and in order to reduce the amount of the *supersedeas* bond it was stipulated that plaintiff should have possession of it pending the determination of the title by an appeal, *held*, that such stipulation did not constitute a performance of the judgment in such sense as to waive the appeal: *Sample v. Collins*, 81-23.

Where a decree in a divorce suit directed the defendant to pay to plaintiff a sum as temporary alimony, and other sums to her attorneys for prosecuting the suit, such payment

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to be made by a person not a party to the suit, who was designated as the guardian of defendant, who was insane, *held*, that the payment of these sums by such third person would not be a waiver of defendant's right to appeal: *Tiffany v. Tiffany*, 50 N. W. R., 554.

A party who proceeds in the lower court to enforce a judgment from which he appeals, thereby waives or abandons such appeal: *Reichelt v. Seal*, 76-275.

In an action upon a bond where judgment was rendered against defendant and he failed to appeal, *held*, that he did not thereby waive his right to appeal from the judgment in subsequent intervention proceedings, where the record showed that certain issues arising in the intervention proceedings were expressly reserved for decision in the former proceedings, although the same issues might have been raised and determined upon the trial in the main case: *Richards v. Osceola Bank*, 79-707.

4393. From orders.

Interlocutory orders not final as to the rights of the parties or preventing the final determination of those rights cannot be appealed from: *Walker v. Pumphrey*, 82-487.

Appeal cannot be taken from rulings on motions where they do not affect substantial rights by determining the action or by preventing judgment from which an appeal may be taken, nor involve the merits of the case, nor materially affect the final decision: *Quinn v. Capital Ins. Co.*, 82-550.

The objection that a ruling appealed from is not one from which an appeal is authorized is jurisdictional and will be taken by the court, although not made by the parties: *Ibid.*

An appeal may be taken from an order of a probate court directing a guardian to pay over the amount of a judgment rendered against him as garnishee in a suit against his ward, as such order is one which involves a substantial right: *Coffin v. Eisiminger*, 75-30.

Where, in a special proceeding for the discovery of assets, an order of the court was that the administrator bring suit against the party to such proceeding to determine the rights to the property in question, *held*, that such party was not so affected by the order as to be entitled to appeal therefrom: *In re Estate of Pyle*, 82-144.

An appeal will not lie from an order granting a rule to produce books and papers, for, while the order may affect a substantial right, it neither determines the action nor prevents a final judgment from which an appeal may be taken: *Cook v. Chicago, R. I. & P. R. Co.*, 75-169.

An appeal does not lie from the overruling of a motion to strike surplusage from a petition: *Ida County v. Woods*, 79-148.

An appeal will lie from an order transferring or refusing to transfer to the equity side of the docket issues arising in an action at law: *Price v. Ætna Ins. Co.*, 80-408.

An appeal will lie from the ruling of a court sustaining a motion to strike a cross-petition from the files: *Mahaska County State Bank v. Christ*, 82-56.

An appeal lies from an order of the probate court in a special proceeding for the discovery of assets: *In re Estate of Pyle*, 82-144.

But where in such proceeding the court merely directed suit to be brought by the administrator against the party complained of, to ascertain and enforce his rights, *held*, that such party was not entitled to appeal: *Ibid.*

An order appointing a receiver if made in vacation is appealable, the same as if made in term time: *Clark v. Raymond*, 50 N. W. R., 1068.

An appeal is authorized from the action of the court dismissing a special proceeding to compel the payment by an attorney of money collected by him: *Hawk v. Evans*, 76-593.

Where in a proceeding to have dower set off, an order was made that a certain paper claimed to have been an acceptance of the provisions of the will should be put on record, *held*, that such order was not one from which an appeal could be taken: *In re Estate of Slauson*, 82-366.

Where an appeal was from "the decision" of the court, and the notice failed to indicate the decision from which the appeal was taken, *held*, that the word "decision" meant an adjudication other than a final decision: *Weiser v. Day*, 77-25.

An appeal from an interlocutory order will be dismissed when it is shown that the action has been dismissed in the lower court by the plaintiff in the manner pointed out by the statute: *Chicago, R. I. & P. R. Co. v. Dey*, 76-278.

An interlocutory order cannot be considered on appeal where no appeal from such order appears to have been taken: *Cannady v. Cannady*, 52 N. W. R., 520.

4397. Motion to correct error.

Where no exceptions by appellant to any ruling or finding of the court below appear, no objections to the judgment can be raised on appeal: *British Amer. Ins. Co. v. Neil*, 76-645.

A judgment will not be reversed on account of mere defect in the original notice where no motion was made in the court below to correct the irregularity: *Gray v. Wolf*, 77-680.

Failure of the lower court to state separate findings of fact and conclusions of law cannot first be complained of on appeal. Such error could have been corrected on motion in the lower court: *Ash v. Scott*, 76-27.

Where the costs were taxed to the defendant and it was claimed that there should have been an apportionment, but no motion was made to that effect in the lower court, *held*, that the order of the court would not be disturbed upon appeal: *Cox v. Mason City & Ft. D. R. Co.*, 77-20.

The objection that the instructions read to the jury are not marked as given by the court cannot be raised for the first time on appeal: *Fish v. Chicago, R. I. & P. R. Co.*, 81-280.

The fact that the jury in estimating the amount of recovery makes too large an allowance for certain items for which recovery is

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allowed cannot be raised on appeal where the attention of the lower court has not in some way been called to that fact: *Reynolds v. Iowa & Neb. Ins. Co.*, 80–563.

A party cannot complain in the supreme court in regard to the taxation of costs, unless he has applied to the court below for a retaxation and appealed from the ruling on his application: *Allen v. Leonard*, 52 N. W. R., 557.

While the supreme court will not consider errors that have not been called to the attention of the trial court, it will consider all questions presented to the lower court upon which there was a ruling and exceptions taken when the ruling is assigned as error and presented in argument, although no motion for new trial was made: *Shipley v. Reasoner*, 80–548.

So *held* with reference to the action of the lower court in overruling a motion to direct a verdict for defendant and also overruling a motion for judgment for defendant on special findings, the action of the court in these respects being properly excepted to and the error therein assigned and argued: *Ibid.*

And see notes to § 4244.

4398. Motion for new trial not necessary.

All errors at law arising upon the trial, and to which proper and timely exceptions are taken, may be reviewed on appeal by the supreme court without having been embodied in a motion for new trial: *Hunt v. Iowa Cent. R. Co.*, 52 N. W. R., 668.

The pendency of the motion for new trial at the time an appeal is taken will not in any manner invalidate the appeal or prevent the supreme court from considering the errors assigned: *Ibid.*

Even though motion for a new trial is not filed within such time as that it may be considered, yet exceptions duly taken and errors assigned independent of such motion may be reviewed: *Kaufman v. Farley Mfg. Co.*, 78–679.

4402. Time for taking; amount in controversy; certificate.

Time for taking: The fact that notice of appeal could not have been served upon the opposite party or his attorney within the time required by statute will not excuse failure to comply with the statutory requirements: *McNider v. Sirrine*, 50 N. W. R., 200.

While it is required that the appeal must be taken within six months from the rendition of the judgment or order appealed from, it does not follow that the appeal must be perfected within that time. So *held* in regard to the filing of transcript of short-hand reporter's notes, which need not be within the time allowed for taking the appeal, provided the evidence is properly embodied by reference in the bill of exceptions filed within the time allowed therefor: *Hammond v. Wolf*, 78–227.

Where petition has been filed under the provision of § 4383 for new trial, an appeal may be taken from an order of the court striking such petition from the files, although the appeal is taken more than the specified time after the rendition of the judgment which it is sought to set aside in the petition for new trial: *Wishard v. McNeil*, 78–40.

Where the record did not show the year in which the judgment of the court was entered nor how long after the entry of the judgment the appeal was taken, *held*, that there was nothing to show whether the appeal was taken within the time prescribed by law or not, and in the absence of such showing it would be dismissed: *Gleason v. Collett*, 77–448.

Where the decision was made June 3d, and the appeal was taken December 4th, *held*, that the appeal was not in time and must be dismissed: *Ritchey v. Fisher*, 52 N. W. R., 505.

Amount in controversy: To defeat the jurisdiction of the supreme court on account of the amount in controversy not being sufficient, it must affirmatively appear that the case falls within the limitations of this section, and therefore an appeal will lie in proceedings to abate a liquor nuisance although nothing appears as to the amount involved: *Farley v. Geisheker*, 78–453; *Geiger v. Douglass*, 52 N. W. R., 111.

Where a petition alleged that the value of the property in controversy was $100, and that plaintiff had sustained damages in the sum of $25, and the prayer asked for judgment for $125 and costs, *held*, that the amount in controversy was more than $100, and sufficient, upon appeal, to give the court jurisdiction without the certificate of the trial judge: *Ruiter v. Plate*, 77–17.

Where there cannot be a judgment under the pleadings for either party for more than $100, the case is not appealable without the certificate of the judge: *Buckland v. Shephard*, 77–329.

Therefore, where plaintiff's claim of $68.61 was admitted except $4.62, and defendant's claim of $102.06 was denied, *held*, that the amount in controversy was less than $100 and could not be appealed without certificate: *Ibid.*

In an action to subject real estate to the payment of a judgment for fine and costs for illegal sale of liquors, the costs are to be included in determining the amount in controversy: *State v. McCulloch*, 77–450.

Where a verdict is rendered for plaintiff for more than $100, but the plaintiff takes judgment for less than that amount, the amount in controversy is thus reduced so that defendant cannot prosecute an appeal: *Nevada v. Klum*, 76–428.

Plaintiff may reduce the amount in controversy below the amount required in order to sustain an appeal, by waiving his claim to a part of the amount sought to be recovered: *Farley v. Geisheker*, 78–453.

A tender accepted pending the suit, and admitted in the answer, reducing the amount in recovery to less than $100, prevents appeal from the judgment without certificate of the judge: *Hassett v. Germania Building Association*, 78–386.

A party may by amendment after verdict reduce the amount claimed to less than $100, and thereby prevent appeal except on certificate of the judge: *Giger v. Chicago & N. W. R. Co.*, 80–492.

Interest in real property: A case involving the enforcing of a lien for less than $100

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cannot be brought to the supreme court on appeal without the certificate required. A mortgage conveys no interest or title in the real property; the interest of the mortgagee, therefore, is not such an interest as gives rise to a right to appeal without regard to the amount involved: *Brown v. Smith*, 76–315.

An action to quiet title as against a sheriff's deed, on the ground that the property was plaintiff's homestead, "involves an interest in real estate," and may be appealed without a certificate regardless of the amount in controversy: *Jones v. Blumenstein*, 77–361.

Certificate: Where a certificate fails to state that a determination of the questions presented in it was involved or essential in the case, the court acquires no jurisdiction on appeal: *Beeler v. Garrett*, 76–231.

Each question certified should present a question of law distinct from other questions of law and fact, and where the certificate of the trial judge contained questions involving the consideration of evidence and its weight and effect, *held*, that such questions were questions of fact, of which the court had no jurisdiction: *Bensley v. Chicago & N. W. R. Co.*, 79–266.

The supreme court will not look at the testimony to satisfy itself as to the question certified. Without the facts being specifically found, no question of law arises: *Des Moines Insurance Co. v. Briley*, 79–485.

It is not necessary to set out the testimony or the record of the proceedings below further than to show that the question certified is involved in the case: *Ibid.*

The certificate must point out the question upon which the opinion of the supreme court is desired so explicitly as to render the examination of the record unnecessary, and the court will not look to the record to ascertain what question it is called upon to determine; but when the question is explicitly certified and it is claimed that it did not arise in the case the court will look to the record to determine that question: *Martin Steam Feed, etc., Co. v. Olive*, 82–122.

Matters not appearing in the certificate cannot be considered. The court will look to the record to see if the questions certified are involved in the case, but will not decide questions not certified: *Jennings v. Bacon*, 51 N. W. R., 15.

It is not sufficient to state in the certificate the facts and conclusions of law upon which a ruling of the court was made, but it must present some question as to such facts and conclusions for the determination of the supreme court: *Campbell v. Lewis*, 50 N. W. R., 208.

Where questions certified call for answers in the nature of conclusions based upon the determination of several distinct questions of law, and cannot be answered without considering these questions, and answering each severally, they are not such as are contemplated by the statute. The court cannot be called upon to determine all the law questions in the case by a general question which brings them all up for consideration. Questions of doubt, and those only, should be specifically and separately stated: *Hawkeye Ins. Co. v. Erlandson*, 50 N. W. R., 881.

Where a certificate is not one such as is required by statute, the supreme court will dismiss the appeal, although the objection is not made by the parties. The question is jurisdictional: *Ibid.*

The certificate must on its face show the jurisdictional facts. It is not sufficient to state that the cause involves questions on which it is desirable to have the opinion of the supreme court, but it must also state that the questions certified are involved in the case: *Lamb v. Ross*, 51 N. W. R., 48.

Questions not involved in the case will not be considered, though certified, nor will questions involved be considered when not certified: *Pickerell v. Hiatt*, 81–537.

Where the certificate in a case involving less than $100 recited the ultimate facts established by the evidence, and upon which the questions certified depended, *held*, that the certificate was sufficient to enable the court to consider the case: *Winelander v. Jones*, 77–401.

The certificate must be made at the time of the trial and then made a part of the record, and where a certificate was filed on the day following that on which the case was tried and determined, *held*, that it could not be considered: *Brown v. Grundy County*, 78–561.

Where the motion for a new trial was ruled on at 10 A. M. and a certificate of appeal was not signed by the judge until 2 P. M., *held*, that the certificate was not signed too late: *Courtright v. Singer Mfg. Co.*, 77–317.

Where the answer to a question certified depends upon a fact not appearing in the certificate the question cannot be determined: *Ibid.*

4403. Appeal by co-parties.

Failure to serve notice upon co-parties is not jurisdictional, but the court can consider such questions in the case as affect only the rights and interests of the appellant and the adverse party: *Wright v. Mahaffey*, 76–96; *Kellogg v. Colby*, 49 N. W. R., 1001; *Soukup v. Union Inv. Co.*, 51 N. W. R., 167.

This section does not apply to an appeal by plaintiff where there are two or more defendants, and service on all the co-defendants is not required for the perfection of the appeal: *Payne v. Raubinec*, 82–587.

Where it appeared that the real party in interest was not a party to the appeal, and where no notice of appeal had been served on her by the appellant, *held*, that the appeal would be dismissed: *Day v. Hawkeye Ins. Co.*, 77–343.

In a proceeding for an assignment of dower, involving the rights of different parties, an appeal was taken by one of such parties, but no notice thereof was served on his co-defendants. *Held*, that the appeal must be dismissed: *Lapprell v. Joseph*, 49 N. W. R., 1021.

Where defendant in a divorce suit appeared to be insane and was not represented by guardian *ad litem*, but no objection on that ground was taken until the filing of arguments on

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final submission, *held*, that such objection was too late: *Tiffany v. Tiffany*, 50 N. W. R., 554.

Where an executor has made a sale of real estate which is set aside on application in the lower court, the executor has such interest therein as to entitle him to an appeal: *In re Estate of Bagger*, 78–171.

4404. Parties not joining.

That a party not appealing can have no relief on the appeal, see notes to § 4392.

4407. Notice of appeal.

Upon adverse party: The assignment of a decree after its rendition will not make the assignee a party to the action so as to require service of notice of appeal upon him: *Littleton Sav. Bank v. Osceola Land Co.*, 76–660.

In a particular case, *held*, that a person was not a party to the suit in such sense that notice of appeal need be served upon him: *Christie v. Life Indemnity, etc., Co.*, 82–360.

Service of notice of appeal upon the guardian *ad litem* of an insane person, who was also his attorney of record, *held* sufficient without service upon the party himself: *Shoemake v. Smith*, 80–655.

Upon attorney: Where an action was commenced against several defendants, and one of them by application had himself joined with plaintiff and declared to be a party plaintiff in the case, and was represented by the attorneys who brought the action for the original plaintiff, *held*, that a notice of appeal by defendants directed to the other plaintiff by name and to his attorneys, service of which was accepted by such attorneys as attorneys for plaintiff, was not sufficient as a notice of appeal to the party who had been made plaintiff, and that, as he was a necessary party to the appeal, it could not be prosecuted: *Goodwin v. Hilliard*, 76–555.

A notice "to the above-named plaintiff, or to W. H. Stivers, his attorney," and served upon such attorney, is sufficient: *Bruner v. Wade*, 52 N. W. R., 558.

Upon clerk: Service of the notice of appeal upon the clerk of the lower court is essential to the perfecting of the appeal, and in the absence of such service appearing of record the appeal will be dismissed on motion: *Independent Dist. v. Apperle*, 76–238; *McManus v. Smith*, 76–576; *Redhead v. Baker*, 80–162; *State ex rel. v. Clossner*, 51 N. W. R., 16.

Record must show: Where the record does not show that an appeal was taken from the decree of the lower court, the appeal will be dismissed: *Kimball v. Barngrover*, 80–768; *Talbot v. Noble*, 75–167.

Where an additional abstract, not denied, shows that notice of appeal has not been served on the clerk, such abstract will be deemed to be true, and the case will be dismissed: *Smith v. Des Moines*, 51 N. W. R., 253.

A failure of the transcript to show a notice of appeal served on the clerk is *prima facie* evidence that none has been served, and in the absence of further showing would be sufficient to defeat the appeal; but where the notice was in fact served and filed with the clerk, but was lost with the return of service, and such fact was satisfactorily shown by affidavits, *held*, that the appellants were entitled to a continuance to enable them to have the defect in the record corrected, but as the appellees failed to ask to have the lost record restored or to object to the competency of the evidence offered to show the fact of service, the defect in the transcript was not fatal to the appeal: *Malcomsen v. Graham*, 75–54.

After appellee had appeared and filed amended abstract, *held*, that he could not first urge in reply that the record did not show the taking of an appeal: *Roundy v. Kent*, 75–662.

Appeal jurisdictional: The question as to whether an appeal has been taken is jurisdictional, and the court will not consider the case, unless the taking of the appeal is shown by the record, even though the question is not made by counsel: *McManus v. Swift*, 76–576.

The appeal is necessary to give the supreme court jurisdiction, and it cannot be waived by appearance of the parties to the merits of the case. Where the fact of the taking of the appeal does not appear from the abstract, the case will be dismissed: *Whitton v. Fuller*, 77–599; *State ex rel. v. Clossner*, 51 N. W. R., 16; *First Nat. Bank v. City Council of Albia*, 52 N. W. R., 333; *Farrell v. Muscatine*, 52 N. W. R., 333; *Mandel v. Friedman*, 52 N. W. R., 333; *Donnelly v. Cedar County*, 75–536; *Schooley v. Globe Ins. Co.*, 76–78.

Unless the abstract shows service of the notice of appeal on the clerk, as well as on the opposite party or his attorney, the appeal will be dismissed for want of jurisdiction: *State ex rel. v. Clossner*, 51 N. W. R., 16.

Sufficiency of notice: Where an appeal was from "the decision" of the court, and it was not indicated in the notice what decision was appealed from, and when there were several decisions other than the final decision, *held*, that the notice of appeal was fatally defective: *Weiser v. Day*, 77–25.

There is usually but one final adjudication or judgment as to the same party, and a notice which specifies the judgment of the court in the case, naming it, is sufficiently definite in indicating from what the appeal is taken: *Searles v. Lux*, 52 N. W. R., 327.

The fact that the notice does not specify the term of court to which the appeal is taken is not fatal: *Geyer v. Douglass*, 52 N. W. R., 111.

Where the notice advised the opposite party of the appeal "from the decision and judgment" of the court, *held*, that it necessarily referred to the final judgment and was sufficiently specific: *Ibid.*

The provision of § 4444 that the notice must be returned immediately after service to the office of the clerk is directory, and a failure to comply with such requirement does not affect the appeal: *Littleton Sav. Bank v. Osceola Land Co.*, 76–660.

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4408. When appeal perfected; transcript.

Where co-defendants do not plead in common, and the defenses set up by one are not available to the other, an appeal may be taken by plaintiff as against one of such defendants without making the other a party: *Payne v. Raubinek*, 82–587.

There is no provision fixing the time within which an appeal must be perfected by paying or securing the fees of the clerk for transcript: *Bruner v. Wade*, 52 N. W. R., 558.

By the provisions of § 2396, officers are not entitled to demand their fees in advance, in actions to enjoin liquor nuisance, and therefore an appeal in such case will not be dismissed for failure to pay or secure the clerk's fees for transcript: *Searles v. Lux*, 52 N. W. R., 327.

The *supersedeas* bond does not operate to secure the fees of the clerk within the requirements of this section: *Peterson v. Hays*, 51 N. W. R., 1148.

The supreme court will not recognize nor examine the original papers in a case transferred to it from the lower court except the evidence on which the case is tried in equity. And where the appellant insists that all the evidence is before the court, and that allegation is denied by appellee, it cannot be established by reference to a certificate of the evidence filed in the lower court and transferred with the original papers to the supreme court, instead of being certified by transcript: *Cox v. Macy*, 76–316.

For the same reason the fact that an appeal is taken when put in issue cannot be established by the original notice of appeal of which no transcript is furnished: *Ibid.*

Where it appears that the abstract contains the substance of the entire record and should not have been denied by appellee, motion of the appellant to strike the denial and tax the costs thereof and of the transcript to appellee will be sustained: *Taylor v. Chicago, M. & St. P. R. Co.*, 80–431.

Where a motion was made to tax the costs of transcript and amended abstract to appellee, and afterwards it was stipulated that the case should be tried on an amended abstract, *held*, that such stipulation was a confession that the record was not sufficiently presented in the abstract and that the motion should be overruled: *Winter v. Central Iowa R. Co.*, 80–443.

4409. When appeal heard.

A recital in the notice of appeal that the case will be for hearing at a term subsequent to the term at which by statute and the rules of the court it will be heard is surplusage, and should be disregarded. In such case the appellee might, by filing a transcript at the next term of court after service, have an affirmance or dismissal: *Mickley v. Tomlinson*, 79–888.

4410. Failure to file transcript; dismissal.

An appeal which has been properly perfected will not be dismissed merely because of a defective record, but will be affirmed or reversed as the record will justify: *Zimmerman v. Merchants' & Bankers' Ins. Co.*, 77–350.

An appeal will not be dismissed on account of failure of the appellant to file the transcript within the prescribed time, when it appears that the appeal was taken in good faith and not for delay, and that the delay in prosecuting it was unavoidable and partly by consent: *McKay v. Woodruff*, 77–413.

Appellee is not entitled to have an appeal dismissed on a suggestion or request made in argument only, or after argument. He should file a motion for that purpose, showing the failure of which he complains, and make demand for a dismissal: *French v. French*, 51 N. W. R., 145.

4414. What shall be sent up; transcript.

Transcript: Cases in the supreme court are tried only upon the record remaining in the court below, certified by transcript. The transcript cannot be altered, added to or contradicted by matter *dehors* the record: *Blanchard v. Devoe*, 80–521.

Appeals to the supreme court are based upon the records of the case in the court from which they are brought, and it is not competent to explain, contradict or extend the recital of the record by affidavits or certificates: *McArthur v. Schultz*, 78–364.

Therefore, *held*, that a certificate of the trial judge as to matters transpiring between the attorney and the judge in the lower court which were not of record could not be considered: *Ibid.*

Improper remarks by the judge in the presence of the jury, made a ground of motion for a new trial, should, for the purpose of appeal from a ruling of the court on such motion, be preserved by bill of exceptions and not by affidavits in the lower court: *State v. Hall*, 79–674.

Misconduct of attorney in the trial of a cause cannot be shown on appeal by affidavit. Such misconduct must be made to appear by bill of exceptions or certificate of the lower court: *State v. Clemons*, 78–128.

An argument of counsel of which complaint is made will not be considered upon appeal, where the abstract fails to show that it was preserved by a bill of exceptions: *Nelson v. Chicago, M. & St. P. R. Co.*, 77–405.

Affidavits and counter-affidavits of counsel filed in the supreme court with reference to what was made of record in the lower court cannot be considered: *Rosenbaum v. Partch*, 52 N. W. R., 181.

The fact that parties stipulate that evidence in another case may be used in an action does not make the evidence in such other case a part of the record, it not appearing that any such evidence was introduced: *Pitts v. Lewis*, 81–51.

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Where it is necessary to refer to the transcript in order to determine whether the evidence was certified in the lower court and whether the appeal was properly taken, the abstract cannot be supported by the original certificate of the judge and notice of appeal transmitted to the supreme court with the original papers in the case instead of by transcript: *Cox v. Macy*, 76–315.

The court cannot recognize the original papers as a substitute for the transcript for the purpose of determining a controversy as to the contents of the record: *Lookabill v. Foulks*, 49 N. W. R., 1019.

Evidence not made a part of the bill of exceptions but certified by the clerk of the district court cannot be considered a part of the record: *Neitz v. Hilker*, 51 N. W. R., 23.

An agreed statement of facts not certified by the judge trying the case, nor otherwise identified and made a part of the record, cannot be considered on appeal: *Underwood v. Lombard Inv. Co.*, 50 N. W. R., 219.

Where an objection is raised to the ruling of the court which was partly based on facts known to the judge, in addition to affidavits filed in the case, the statement of the judge should be embodied in the record: *Foster v. Hinsen*, 75–291.

Where the bill of exceptions was filed too late, *held*, that a motion to dismiss the appeal on the ground that the evidence had not been preserved would be sustained, at least to the extent of striking what purported to be the evidence from the record: *Short v. Chicago, M. & St. P. R. Co.*, 79–73.

The documentary evidence introduced on the trial of an equity case should be incorporated in and attached to the short-hand reporter's transcript of the testimony, and certified by the judge, and even if a certificate by the clerk would be sufficient in such cases, under the provisions of § 3949, such certificate should be made within the time allowed for the appeal: *Jamison v. Weaver*, 50 N. W. R., 34.

Reporter's notes: The identification of certain documents in the reporter's translation of his notes embodied in a bill of exceptions, *held* sufficient to render such documents a part of the record: *Johnston v. McPherran*, 81–230.

The certificate of the reporter to his notes and the translation thereof will not dispense with the certificate of the trial judge to show that all the evidence is of record: *Blanchard v. Devoe*, 80–521.

The reporter's transcript of the evidence, properly certified by him and the clerk, cannot be considered, where it does not appear that the testimony was preserved by bill of exceptions, and that the notes or the transcript was ever certified by the judge: *Neitz v. Hilker*, 52 N. W. R., 514.

In a law case. it not being required that the evidence be certified by the judge within the time allowed for the appeal (as is required in equity cases by § 3949), if the short-hand reporter's notes of the testimony are properly embodied in a bill of exceptions, the transcript thereof need not be filed within the time for filing the bill of exceptions, but may be filed within such time as to permit the submission of the case to the supreme court in the manner and within the time fixed by statutory and other rules applicable in such cases: *Hammond v. Wolf*, 78–227.

It is not necessary that the reporter copy the documentary evidence into the transcript of the short-hand notes in an equity case. The judge's certificate being attached to the short-hand notes, wherein the documentary evidence, filed with and certified by the clerk, is sufficiently identified, and a transcript of the short-hand notes duly certified by the reporter, and filed within the time required, setting forth a copy of the judge's certificate, constitute a sufficient identification of the evidence: *Richardson v. Gray*, 52 N. W. R., 10.

In an action at law where the reporter's short-hand notes were duly certified and made a part of the record, *held*, that this was a sufficient bill of exceptions, although the translation was filed too late to answer the requirements of the statute for filing a bill of exceptions: *Fleming v. Stearns*, 79–256.

4416. Supersedeas bond.

The taking of an appeal and filing of a *supersedeas* bond do not affect the judgment, which remains in full force, but process thereon is suspended until the appeal is determined; and in case of a decree granting an injunction the injunction remains in full force, and the appeal and *supersedeas* bond do not give the party enjoined a right to violate it: *Lindsay v. Clayton District Court*, 75–509.

A surety on a *supersedeas* bond will be bound by judgment rendered in the supreme court, although he is not a party to the action and has not been served with notice: *Phelan v. Johnson*, 80–727.

4424. Trial of appeal; proceedings.

I. The Abstract.

Time for filing: Failure to file an abstract or argument within the time required by the rules of the court will not be ground for striking it from the files and taxing the costs thereof to the party filing it, where it does not appear that the submission of the cause was delayed thereby: *Doolittle v. Doolittle*, 78–691; *Wilson v. Daniels*, 79–132; *Spencer v. Moran*, 80–374: *Lathrop v. Doty*, 82–272; *Thomas v. McDaneld*, 77–126.

An additional abstract will not be stricken from the files on the ground that it was not filed within proper time, if filed and served so long before final submission that it appears there could have been no prejudice by the delay: *Scholl v. Bradstreet*, 52 N. W. R., 500.

Where it appeared that there had been an agreement by counsel extending the time for filing appellee's abstract, *held*, that the court would not strike such abstract from the files and tax the costs thereof to appellee because filed later than the time agreed upon, there

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being no written evidence as to what the agreement of the counsel in the premises was: *Taylor v. Chicago, M. & St. P. R. Co.*, 80–431.

An appellant has a right to amend his abstract when done before the argument of appellee is served on him, and in ample time to permit appellee to make any argument he desires on the record as amended: *Groneweg v. Kunworm*, 75–237.

Form: Where the abstract set out the titles to several causes with a view to their presentation in one appeal, *held*, that as to the cause fully presented in such abstract the court would consider the appeal: *Searles v. Lux*, 52 N. W. R., 327.

The abstract should not set out the pleadings with exhibits and the written evidence in full. It is sufficient, in incorporating deeds and mortgages, to state the introduction of the instrument in evidence, giving the substance only of what is material to questions in the case. The court ought not to be required to examine any part of the record except that which is necessary to determine the questions presented by the appeal. And in a case where the abstract did not comply with these requirements, a motion to strike it from the files was sustained and appellant was given additional time in which to file an abstract: *Seekell v. Norman*, 76–234.

Where an amended abstract consisted largely of questions and answers printed in full, *held*, that such form of presenting the record was unnecessary, and the abstract would on motion be stricken from the files: *State v. Hull*, 48 N. W. R., 917.

Statements in an abstract as to the fact of rendition of judgment, settlement of bill of exceptions and proof of appeal, *held* to be sufficient in a particular case: *Waller v. Waller*, 76–513.

Costs of abstract: Where a large portion of the testimony of witnesses was unnecessarily set up in the abstract by question and answer, and deeds, including the certificates of acknowledgment, were set out at length, *held*, that it was a proper case for taxing a portion of the costs of such abstract to appellant: *Jones v. Campbell*, 51 N. W. R., 37.

In a particular case, *held*, that costs of unnecessary printing should be taxed to appellant, although the case was reversed: *McDermott v. Iowa Falls & S. C. R. Co.*, 52 N. W. R., 181.

While it is the duty of the appellant to submit a fair abstract of so much of the record as is necessary to an understanding of the questions involved, yet the costs of printing an additional abstract will not be taxed to him, where there is not an intentional omission of material matter from the abstract: *Schneitman v. Noble*, 75–120.

Where the appellee filed an additional abstract, which contained an abstract of all the evidence, and which appellant claimed to be unnecessary to a determination of the questions involved, but which was filed upon the claim that the evidence showed, without conflict, that plaintiff had been paid in full, and it did not appear that the claim was not made in good faith, *held*, that the costs should be taxed to the appellant upon an affirmance of the judgment: *King v. Mahaska County*, 75–329.

Where an additional abstract is necessary for the purpose of setting out the charge of the court in order to show that the instruction asked was not erroneously refused in view of the instructions given, the costs of such abstract will not be taxed to appellee: *Albrosky v. Iowa City*, 76–801.

Where appellant's abstract failed to set out the verification of the answer, which was material, *held*, that appellee might properly file an amended abstract setting out such verification, and that the costs of such additional abstract should be taxed in the case: *Comes v. Chicago, M. & St. P. R. Co.*, 78–391.

Where some of the matters set out in the additional abstract were material to a full understanding of the case, *held*, that costs of such abstract would not be taxed to appellee, even though it might be fuller than necessary, the unnecessary expense being little more than nominal: *Benton County Bank v. Walker*, 51 N. W. R., 241.

In a particular case, *held*, that the additional abstract was necessary to a fair understanding of some of the rulings of the court, called in question on the appeal, and, while more voluminous than necessary, was not so much so as to require that the costs be taxed to appellee: *Meyer v. Houck*, 52 N. W. R., 235.

Appellant is not entitled to have taxed as costs the expense of preparing typewriter copy of his abstract: *McNider v. Sinine*, 51 N. W. R., 170.

Case determined on abstract: The transcript is not consulted unless the parties disagree as to the record set out in the abstract, and where the parties agreed to submit the cause on the abstract of plaintiff, *held*, that it would be presumed that the abstract was correct and the transcript would not be examined, and as the abstract failed to show that an appeal was taken, or a notice of appeal served, the case would be dismissed: *Talbort v. Noble*, 75–167.

Although the parties each claim that the abstract of the other is incorrect, the court will not refer to the transcript and original evidence, if it is not necessary in order to determine the case: *Charlton v. Sloan*, 76–288.

Where the issue is raised as to the correctness of the abstract, and appellant, after a reasonable time, has omitted to file a transcript, the judgment will be affirmed: *Howorth v. Seevers' Mfg. Co.*, 78–627.

Alleged errors will not be reviewed where the evidence necessary to show the existence of the error is not made to appear in the abstract. In such case the presumption will be entertained that the ruling of the court was correct: *Brown v. Long*, 76–414.

Must show taking of appeal: See notes to § 4407.

Must be based on record: Statements in an additional abstract not appearing to be based upon the record, but to be merely statements of counsel, will not be considered: *Payne v. Raubinek*, 82–587.

There should be no uncertainty as to the identity of instructions presented for review, and the method pointed out by law for their identification should alone be relied upon: *Ibid.*

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Where the evidence embodied in the abstract has not been made of record in the court below, it may be stricken from the abstract on motion: *Harrison v. Snair*, 76–558.

An oral agreement by counsel that a case shall be submitted upon appeal on appellant's abstract, and that a transcript shall be waived, cannot be established by affidavits of appellant's attorneys: *Riegelman v. Todd*, 77–696.

Abstract of all the evidence: The court cannot review a question involving the evidence upon which the action of the lower court is based, when the abstract does not show that it is an abstract of the evidence of all the witnesses, or an abstract of all evidence introduced and offered on the trial: *In re Estate of Holderbaum*, 82–69.

Where the questions presented are such as can only be considered by reference to the testimony, and it appears that the abstract is not an abstract of all the evidence, questions raised will not be considered: *Shattuck v. Burlington Ins. Co.*, 78–377; *Neitz v. Hilker*, 51 N. W. R., 23.

Where it is necessary that the abstract should contain all the evidence, it is not sufficient that it states that it contains all of the material evidence: *McCoy v. American Emigrant Co.*, 76–720.

An abstract which purports to contain the testimony in "so far as the same is necessary to a correct understanding and consideration of the questions involved and presented for the decision of the court," does not, show that the court has all the evidence before it, so that it can pass upon the sufficiency of the evidence to sustain the verdict: *Leiber v. Chicago, M. & St. P. R. Co.*, 50 N. W. R., 547.

As to when it is necessary that the record shall contain all the evidence in order to enable the court to consider questions presented on appeal, see notes *infra* under this section.

Sufficiency of showing that abstract contains all the evidence: Where it is apparent that appellant claims that he has presented an abstract of all the evidence it will be presumed that he has done so in the absence of any abstract of appellee showing additional evidence: *Guinn v. Phœnix Ins. Co.*, 80–346.

Where appellant states that his abstract is an agreed abstract, that fact will be deemed true unless denied by appellee, but after such denial it becomes the duty of the appellant to establish the fact of the agreement: *Shattuck v. Burlington Ins. Co.*, 78–377.

Where appellee has filed an additional abstract and it appears that the abstracts present all the evidence introduced on the trial, a motion to strike from the records the bill of exceptions on the ground that it was not filed in the district court within the time limited by the agreement of the parties will be overruled: *Richardson v. Blinkiron*, 76–255.

Where the abstract purports to contain the entire record and the additional abstract sets out other evidence but does not deny that the two abstracts together show all the evidence introduced and the full record of the case, it will be presumed that the full record is before the court: *In re Estate of Bagger*, 78–171.

Denial: Where an abstract claims to be an abstract of all the evidence, but that statement is denied in appellee's abstract, the statement of appellee will be deemed true unless denied by appellant: *Shattuck v. Burlington Ins. Co.*, 78–377.

An amended abstract, not denied, must be assumed as true, and if such amended abstract denies that evidence set out in the original abstract was introduced, the evidence will not be considered as before the court: *Knight v. Chicago, R. I. & P. R. Co.*, 81–310.

An amended abstract which is not denied will be deemed true, and if such amended abstract denies that matters appearing in appellant's abstract are a part of the record they will not be considered: *Cox v. Mason City & Ft. D. R. Co.*, 77–20.

Where an additional abstract was filed by the appellee denying that appellant's abstract contained all the evidence, and showing that the motion for a new trial was not filed within the time required by statute, and where appellant denied the additional abstract but failed to file a transcript, *held*, that as there was no extension of time for filing the motion for a new trial, all questions depending upon it or upon the evidence would be disregarded: *Riegelman v. Todd*, 77–696.

Where the abstract of appellant was denied by an additional abstract of the appellee, and appellant filed an amendment to its abstract but did not deny the additional abstract, *held*, that the supreme court would not refer to the transcript to determine the matter, but would accept the statement of appellee's abstract as correct: *Brooke v. Chicago, R. I. & P. R. Co.*, 81–504.

An amended abstract denying that all the evidence is set out in appellant's abstract and denying that any transcript of the reporter's notes has been filed and made a part of the record, which amended abstract is itself not denied, will be deemed true: *Harper v. Gleyslein*, 50 N. W. R., 548.

Where the appellant sets out evidence in his abstract as having been made of record in the lower court, and the appellee files his certificate with the clerk of the lower court showing the fact that no translation of the short-hand notes has been deposited or filed in his office, and that therefore the evidence set out in the abstract is not of record, such certificate is to be regarded as an amended abstract showing the true condition of the record and denying the correctness of appellant's abstract: *Harrison v. Snair*, 76–558.

Where after appellee had filed an abstract denying the correctness of appellant's abstract and amendment a stipulation was entered into that such abstract and amendment would be fully sustained by the transcript of the record if filed, *held*, that such stipulation was a withdrawal of appellee's denial and obviated the necessity of filing a transcript: *Lindsley v. Western Mut. Aid Soc.*, 50 N. W. R., 29.

A denial in argument alone is not sufficient to overcome the presumption in favor of the truth of appellant's abstract: *Anglo-American Land, etc., Co. v. Bush*, 50 N. W. R., 1063.

Where appellant's abstract claims that it is a presentation of all the evidence, and appellee presents an additional abstract containing additional evidence, but claiming that the two abstracts together do not present all the evidence, such allegation of the additional ab-

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stract will be deemed true unless denied by appellant. (Overruling *McArthur v. Linderman*, 62-307): *Goode v. Stearns*, 82-709.

Where appellee denies the correctness of appellant's abstract and amends the same for the purpose of presenting his appeal, without undertaking to correct mistakes or supply defects in the original abstract, nothing further being presented by the appellant, this denial will be taken as true and appellant's abstract will be held to be incomplete: *Chapin v. Garretson*, 52 N. W. R., 104.

Where appellee files an abstract setting out some evidence in addition to that set out by appellant, but claiming that the abstracts together do not contain all the evidence, the cause cannot be tried *de novo*: *State v. Roenisch*, 77-379.

Where appellee presents an additional abstract, but with the statement that both abstracts do not contain all the evidence, and this additional abstract is not denied by appellant, the court cannot consider that it has all the evidence before it, and cannot determine questions depending upon a consideration of the testimony: *Carson, etc., Co. v. Knapp, etc., Co.*, 80-617.

Where appellee filed an additional abstract denying the correctness of appellant's abstract, and appellant filed a statement practically re-affirming the correctness of the abstract, *held*, that there was a sufficient denial of the additional abstract: *Joy v. Bitzer*, 77-73.

When the abstracts of parties present an issue of fact as to the state of the record in a law action, the question must be settled by reference to the bill of exceptions, which it is the duty of the appellant to furnish: *Zimmerman v. Merchants' & Bankers' Ins. Co.*, 77-350.

Therefore, where there was no bill of exceptions, and the appellee filed an additional abstract denying that certain instructions complained of and set out in appellant's abstract were ever filed, and the additional abstract was not denied, *held*, that a motion to strike the instructions from the record would be sustained: *Ibid.*

II. Arguments.

Failure to present argument: Where appellants file no brief or argument, it will be presumed that they have abandoned their appeal, and it will be dismissed: *Raynor v. Raynor*, 77-282.

While the same rule is not applied to an appellee, in the absence of an argument he cannot complain if the conclusion is against him and the reasons for the decision are not given: *Russell v. Torbet*, 81-754.

Questions not argued: The supreme court will not consider errors assigned which are not argued by counsel: *Marsh v. Chicago, R. I. & P. R. Co.*, 79-332; *Estabrook v. Riley*, 81-479; *Hull v. Independent Dist.*, 82-686.

Errors assigned but not argued will be considered abandoned, and questions argued but not presented by the assignment will not be considered: *Duncombe v. Powers*, 75-185.

Upon appeal, the decision of questions not argued by counsel on both sides of the case will be avoided if possible: *Humphrey v. Walker*, 75-408.

Where a case is argued by the appellant only, the court will determine no more than is actually necessary for its disposition: *Dodd v. Scott*, 81-319; *State v. Semotan*, 51 N. W. R., 1161.

Effect of statements: Where counsel in opening argument made a concession as to the fact of a deed's having been recorded, *held*, that he could not in reply question the existence of such record: *Hood v. Smith*, 79-621.

The supreme court will look to arguments of counsel to aid its conclusions from the record, but not for facts which it is within the province of the record to disclose: *In re Bresee*, 82-573.

Additional: In a particular case, *held*, that an additional argument by appellee, filed after appellant's reply to appellee's argument, would not be stricken from the files: *Meca v. Brown*, 45 N. W. R., 1041. (On rehearing, 50 N. W. R., 46.)

III. What Questions Will and What Will Not be Considered on Appeal.

a. *Questions Not Raised in the Court Below.*

An objection not made or question not raised in the court below cannot be considered on appeal: *Bolton v. McShane*, 79-26; *Kenosha Stove Co. v. Shedd*, 82-540.

A defense which should have been affirmatively pleaded in the court below cannot be raised for the first time on appeal: *Pierce v. Early*, 79-199.

A question as to the jurisdiction of the court, raised for the first time upon appeal, will not be considered: *Spelman v. Gill*, 75-717.

Objection not raised in the court below, by pleading or in any other way, cannot be considered on appeal. So *held* where it was urged that plaintiff asking equitable relief had not done equity: *Chase v. Kaynor*, 78-449.

Where in an action by a receiver of a corporation against the president to compel him to deliver over a note, the possession of which the receiver claimed to be entitled to, it was directed that the note be delivered to the clerk, and no objection was made to such order in the lower court, *held*, that it could not be questioned on appeal: *Brandt v. Allen*, 76-50.

An amended pleading, filed by a party in the lower court after an appeal is perfected, cannot be considered in determining the appeal, even though the amended pleading is made a part of the record in the supreme court: *Dubuque & S. C. R. Co. v. Cedar Falls & M. R. Co.*, 76-702.

Where it appeared that on the trial below the pleadings were deemed properly verified, and the action was regarded as being based upon an open account, *held*, that a party would not be allowed on appeal to claim that the action was not on account and that an amendment to the petition was not duly verified: *Garrett v. Polk County*, 78-108.

Where exhibits attached to plaintiff's petition were in the court below introduced in evidence without objection, *held*, that it was too late on appeal to object that they were

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only copies and not competent: *Scott v. Chicago, M. & St. P. R. Co.*, 78–199.

The objection that the averments of the reply are inconsistent with those of the petition cannot be raised for the first time on appeal: *Adams County v. Hunter*, 78–328.

Where the petition in an action for fraud does not allege that the party knew the statements constituting the fraud, and without objection on that ground the defendant proceeds to trial, he cannot afterwards raise such objection for the first time on appeal: *Mann v. Taylor*, 78–355.

Objections that pleadings were not properly filed in the lower court, they having been treated in all respects as duly filed, and no objection thereto made, cannot be first raised on appeal: *Winkleman v. Winkleman*, 79–310.

An objection that counsel in argument refers to evidence not introduced cannot first be made on appeal: *Pence v. Chicago, R. I. & P. R. Co.*, 79–389.

An objection to the action of the court in transferring a case to the equity docket cannot be first taken on appeal: *Gate City Land Co. v. Heilman*, 80–477.

Where no objection is raised in the court below based upon an alleged variance between the pleadings and the proof, such objection cannot be first raised upon appeal: *Ressler v. Baxley*, 81–750.

Where a party has assumed in the lower court the burden of proof, he must be held to carry it on appeal, and cannot claim for the first time in the supreme court that the burden does not rest upon him: *Benjamin v. Shea*, 49 N. W. R., 989.

Objection to parol evidence as varying a written contract cannot be first made in the supreme court: *Zabel v. Nyenhuis*, 49 N. W. R., 999.

Where the attention of the court has been called to a question by motion after verdict for judgment *non obstante*, such question may be raised on appeal without having been renewed in a motion for new trial: *Kiggins v. Woodke*, 78–34.

A party not appealing can have no relief: See notes to § 4392.

b. *What the Record Must Show in Order that a Question May be Reviewed.*

That exceptions must be taken, see notes to § 4038.

Objections to evidence: Where it is not shown what was sought to be proved by evidence offered, the supreme court cannot determine whether the exclusion of such evidence was erroneous or not: *Deere v. Bagley*, 80–197; *Hirschl v. Case Threshing Mach. Co.*, 52 N. W. R., 363.

Error in excluding evidence cannot be considered where the record fails to show the substance of the evidence sought to be introduced, so that it may appear whether it was competent: *Bener v. Edgington*, 76–105.

In determining whether or not evidence is properly excluded, the record must show that the evidence was under the circumstances admissible: *State v. Row*, 81–138.

Where the record fails to show what questions were asked the witness in the examination in chief and upon the cross-examination, the court cannot consider an objection to evidence given on cross-examination on the ground that it was not properly elicited: *State v. O'Brien*, 81–93; *Peddicord v. Kile*, 49 N. W. R., 997.

Review of instructions: Objections to an instruction cannot be considered when the instruction does not appear in the record: *State v. Illsley*, 81–49.

Correctness of instructions calling attention to questions on the evidence before the jury can only be considered on appeal when the evidence is embodied in the record: *Thill v. Pohlman*, 76–638,

Upon appeal, where the evidence submitted on the trial is not before the court, the giving or refusing of instructions will not be reviewed so far as the correctness of such rulings depends upon the evidence: *State v. Grossheim*, 79–75.

Where the instructions appear to be correct as abstract propositions of law, the question whether they are correct as applicable to the evidence cannot be determined where the evidence is not before the court: *Neitz v. Hilker*, 51 N. W. R., 23.

The correctness of instructions as to burden of proof cannot be determined where the evidence is not before the court: *Chapel v. Wadsworth*, 52 N. W. R., 514.

In order to determine the correctness of an instruction or a ruling to strike a pleading from the files, it is sufficient if the record shows the pleadings and evidence applicable to the questions involved, although all the evidence is not contained in the record: *Weitz v. Independent Dist.*, 79–423.

Whether verdict or findings supported by evidence: Where the abstract does not purport to contain all the evidence given and the appellee claims that a large part of it is omitted, the supreme court, upon appeal, will not determine whether or not the verdict was supported by the evidence: *Gray v. Chicago, M. & St. P. R. Co.*, 75–100.

All questions involving the sufficiency of the evidence to support the verdict, and the applicability of the instructions to the evidence, require for their consideration that the evidence shall be of record, and presented in the abstract: *Harrison v. Snair*, 76–558.

The ruling of the lower court, on a motion for a new trial based on a claim that the verdict is not supported by the evidence, cannot be reviewed by the supreme court, unless the evidence is all before it; and it will be immaterial that there is in the record the opinion of the judge of the lower court, in which he expresses his belief that the evidence does not support the verdict: *Kinser v. Soap Creek Coal Co.*, 51 N. W. R., 1151.

The findings of facts of the lower court cannot be reviewed, where the abstract does not present all of the evidence: *In re Estate of Holderbaum*, 82–69; *Englert v. Roman Cath., etc., Soc'y*, 82–465.

Misconduct of jurors or counsel: Misbehavior of jurors in the lower court *held* not to be sufficiently established to require a reversal, it not appearing that all the evidence with regard to such misbehavior was in the record: *Grannis v. Chicago, St. P. & K. C. R. Co.*, 81–444.

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As to how such misconduct is to be made to appear, see notes to § 4414.

Taxation of costs: A court cannot, on appeal, interfere with the taxation of costs, where the abstract does not show that the court has before it all the evidence or showings upon which the lower court acted: *McNider v. Sirrine*, 50 N. W. R., 200.

When all the evidence not necessary: Although the evidence may not be of record so as to be considered on appeal, the court may nevertheless decide questions not involving the consideration of the evidence: *Allison v. Jack*, 76–205.

In such case, if the pleadings show that the instructions are applicable to the issues, and instructions asked are applicable to evidence of the same character as the instructions given contemplate, it may be assumed that there was evidence to which the instructions were pertinent, and error in giving and refusal thereof may be considered: *Ibid.*

In an equity case where the appeal presents the single question as to plaintiff's right to dismiss without prejudice, the testimony taken on the trial not being necessary for the full understanding of the question, the case will be considered on appeal, although the abstract does not show all the evidence: *McArthur v. Schultz*, 78–364.

Where the abstract in a divorce case was complete as to the evidence relied on for a divorce, but did not show the evidence on which alimony was granted, *held*, that the court could pass on the sufficiency of the showing for divorce, and, finding that it was not sufficient, could deny the relief asked: *Tiffany v. Tiffany*, 50 N. W. R., 554.

How shown: As to how it is to be made to appear in the abstract that all the evidence is in the record, see notes, *supra*, under this section.

IV. What Will and What Will Not Warrant Reversal.

a. *Presumptions of Regularity.*

In favor of action below: Where it does not appear otherwise, the court must assume facts in support of the action of the lower court: *National State Bank v. Delahaye*, 82–34; *Pierce v. Herrold*, 49 N. W. R., 1042.

The presumption is in favor of the court's rulings in the absence of any showing of error therein: *Smith v. Yager*, 50 N. W. R., 224.

Where it appeared that plaintiff's demand had been reduced by the allowance of a counter-claim of defendant, *held*, that the costs were properly apportioned, and although the amount taxed to plaintiff appeared excessive, yet it would not be presumed that costs were taxed in the abuse of the court's discretion, but rather that the order for the taxation of costs was authorized by the facts: *Minnesota Stoneware Co. v. Knapp*, 75–561.

Where a question asked a witness was excluded and the record failed to show what fact was intended to be elicited by the question, *held*, that it would be presumed that it was properly excluded: *Donnelly v. Burkett*, 75–613.

Where in the trial of a case to the court evidence is admitted subject to objection, it cannot be said on appeal that there was error in the admission of the evidence, as it does not appear affirmatively that such evidence was considered: *Foster v. Hinson*, 76–714.

It is not competent to overcome the presumption in favor of the proceedings in a trial court, in regard to matters which occurred in presence of the court, by means of an affidavit attached to a motion for a new trial: *State v. Kennedy*, 77–208.

Therefore, where a motion for a new trial on the ground that special *venires* were improperly issued was supported by affidavit of an attorney for defendant, but the transcript failed to show the irregularity complained of, *held*, that the facts in regard to the impaneling of the jury should have been made a part of the record by a bill of exceptions, and in the absence of such showing it would be presumed that the jury was properly impaneled: *Ibid.*

In a particular case, *held*, that it would not be presumed from the exclusion of certain evidence that the court intended to exclude other evidence which, if offered, would have been admissible: *Pingery v. Cherokee & D. R. Co.*, 78–438.

In favor of the action of the court in ruling upon a motion based upon a prior conversation with the judge, it would be presumed he took into consideration the matter which was within his personal knowledge and that the matter of which he thus took notice would support his ruling: *Ellis v. Butler*, 78–632.

Upon appeal where the evidence has been stricken from the record, it will be presumed that the instructions given by the trial court are correct and justified by the evidence: *Short v. Chicago, M. & St. P. R. Co.*, 79–73.

Where the abstract fails to show the exact date of the commencement of an action, it will be presumed, in order to sustain the judgment of the court below, that it was commenced after the cause of action accrued: *Ida County v. Woods*, 79–148.

Under the presumption always exercised in support of proceedings of the court below, *held*, that an adjudication on a bail bond that defendant was in default sufficiently proved that there was an indictment pending against him: *State v. Coppock*, 79–482.

In support of the verdict of a jury it will be presumed that the jury found in accordance with the evidence and that their verdict was based upon grounds which they were warranted in considering rather than on those which it would be erroneous for them to consider: *Eckelund v. Talbot*, 80–569.

Where the evidence is not before the court it will, in support of the rulings of the lower court, presume that the undisputed evidence required the lower court to hold as it did with reference to an issue before it: *Gavin v. Bischoff*, 80–605.

Where the competency of evidence which is rejected is not shown, the court will exercise the presumption that the court below rightly rejected it: *Blair v. Madison County*, 81–313.

Where a demurrer was based upon the ground that the petition did not state facts

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which would entitle plaintiff to the relief demanded, and that the cause of action was barred by the statute of limitations, and the demurrer was sustained generally, *held*, that the demurrer was properly sustained upon the first ground, and if sustained upon that ground the question as to the bar of the statute was not involved in the case: *Pickerell v. Hiatt*, 81–537.

Error must appear: In ordinary actions the supreme court will not reverse for errors which do not affirmatively appear of record: *McVey v. Johnson*, 75–165.

The action of the trial court in setting aside a judgment will not be reviewed upon appeal when the determination of the errors alleged depends upon the evidence, which is not set out in the record: *Read v. Divilbliss*, 77–88.

Exclusion of evidence will not be deemed prejudicial where the fact which the question was designed to disclose does not appear: *Cahalan v. Cahalan*, 82–416.

Where a ruling of the court might have been proper under some circumstances, it will be presumed correct unless the circumstances rendering it prejudicial are shown: *State v. Potts*, 49 N. W. R., 845.

Where the affidavits on a motion for new trial, on the ground of misconduct of a juror, were conflicting, *held*, that the error of the lower court in granting a new trial did not affirmatively appear, and its action would not be interfered with: *Wightman v. Butler County*, 49 N. W. R., 1041.

The rule is that error must appear to justify a reversal, and it will not be deemed to be shown by reason of a fact merely assumed for the purpose of argument: *Bruner v. Wade*, 51 N. W. R., 251.

In an action for personal injuries, caused by a defective bridge, where an appeal was taken from the judgment of the lower court, but the abstract failed to show that plaintiff had offered any evidence which tended to show that he had sustained damage of any kind, *held*, that in the absence of such evidence there could be no prejudice in rulings of the court as to the character of the bridge in question: *Donnelly v. Cedar County*, 75–536.

Presumption as to prejudice: Where there is nothing in the record to show that an erroneous ruling could not have resulted in prejudice, the presumption will be that such ruling was prejudicial, and the cause will be reversed: *Hibbard v. Zenor*, 75–471.

If the record fails to satisfy the supreme court that no prejudice has been caused by the error committed, such error cannot be disregarded. This should not be left in serious doubt: *Hall v. Chicago, R. I. & P. R. Co.*, 51 N. W. R., 150.

Error cured: The mere fact that the court attempts to correct an error in the admission of evidence by an instruction to the jury will not necessarily show that there was no prejudice. Errors may be so serious that instructions to the jury will not cure them: *Ibid.*

As to curing error in the admission of evidence by a direction to the jury not to consider it, see notes to § 3996.

b. *What Errors Deemed Prejudicial.*

That immaterial errors, or errors without prejudice, will not warrant reversal, see notes to § 4043.

That error in ruling on motion or demurrer is waived by amending or pleading, see notes to § 3860.

Where justice is done: Where it appears that the jury upon the undisputed facts could have found no other verdict than that which they did find, error in introduction of evidence and the giving of instructions will be deemed without prejudice: *Blair Town Lot and Land Co. v. Hillis*, 76–246.

Where undisputed evidence under one proposition stated in the instructions would render the verdict of the jury correct, the judgment will not be reversed on account of error as to another proposition of law, even though it does not appear but that the verdict was based on such erroneous proposition: *Newell v. Martin*, 81–288.

Slight error: Slight error in estimating the amount of recovery will not justify reversal, and judgment will not be reversed for a nominal consideration: *Rappleye v. Cook*, 79–564.

Where it appeared that the verdict was excessive to the amount of about $12, *held*, that the error was not such as to warrant reversal, although the case was not such as that a *remittitur* could be required: *Van Gorder v. Sherman*, 81–408.

Failure to give nominal damages: A judgment will not be reversed for a mere error in refusing to allow nominal damages: *Thorp v. Bradley*, 75–50; *Stuart v. Trotter*, 75–96.

A judgment will not be reversed for failure to give nominal damages: *Cook v. Chicago, M. & St. P. R. Co.*, 49 N. W. R., 92; *Harwood v. Lee*, 52 N. W. R., 521.

An omission to award nominal damages when the evidence shows the right to recover no more is no ground for setting aside judgment and granting a new trial: *Williams v. Brown*, 76–643.

Upon an appeal in an action for breach of contract where it is shown that there has been no damage to plaintiff, failure of the lower court to instruct the jury that plaintiff is entitled to nominal damages will not be ground for reversal: *Faulkner v. Closter*, 79–15.

Where it is shown that the actual damage, if any, is merely nominal, the judgment will not be disturbed on the ground that nominal damages were not allowed: *Fleming v. Stearns*, 79–256.

c. *Review of Ruling Granting or Refusing New Trial.*

A clearer case is required to authorize a reversal of an order granting a new trial than is required to reverse an order refusing a new trial. In the latter case it must clearly appear that the court abused its discretion: *Halpin v. Nelson*, 76–427.

Where there are successive verdicts for the same party and the lower court finally refuses to set aside the verdict because of the insufficiency of the evidence, it requires a strong

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case of abuse of judgment on the part of the jury to justify a reversal on appeal: *Slocum v. Knosby*, 80–368.

d. *Review of Verdict of Jury or Findings of Court.*

Conflicting evidence: When the verdict of the jury or the finding of the trial court involves the determination of a question of fact as to which there was a conflict in the evidence, or a deduction from proven facts which could be fairly arrived at from those facts, it will not be disturbed: *Primmer v. Primmer*, 75–415.

It is not essential to a conflict of evidence that the testimony shall come from opposing sides, but if the facts and statements are such that they tend to lead the mind of the court to opposite conclusions as to a particular fact in issue, there is a conflict of evidence: *Saar v. Finken*, 79–61.

Judgment will not be reversed on account of the insufficiency of the evidence to support the verdict where the evidence is conflicting: *Rogers v. Winch*, 76–546; *Dalhoff v. Bennett*, 77–140; *Saar v. Finken*, 79–61; *Taylor v. Chicago, M. & St. P. R. Co.*, 80–431; *Fulliam v. Hagens*, 50 N. W. R., 215.

Verdict against evidence: A judgment rendered upon a verdict which is in conflict with the evidence and the instructions of the court, and which for that reason should have been set aside below, will be set aside on appeal: *Olin Tile & Brick Co. v. Barlow*, 76–426.

Where under the instructions, to which no exception was taken by appellant, there was some evidence to support the verdict as to the amount of damage, the verdict will not be set aside as excessive: *Minthon v. Lewis*, 78–620.

Although the verdict seems to be contrary to the weight of evidence the supreme court will not reverse a case on that ground if there is some support for the verdict in the evidence: *Pence v. Chicago, R. I. & P. R. Co.*, 79–389.

Where there is any evidence in support of the verdict of a jury in the court below the case will not be reversed because the verdict was not in accordance with the evidence: *Giger v. Chicago & N. W. R. Co.*, 80–492.

Where there is some evidence to support the verdict it is not for the appellate court to say that the verdict should be set aside. The witnesses being before the jury it is for them to say what weight should be given to the testimony of each: *Van Gent v. Chicago, M. & St. P. R. Co.*, 80–526.

Where it was alleged that a mortgage executed by defendant to his wife was given for the purpose of hindering and defrauding creditors, and the question of fraud was fairly presented to the jury and they found that the mortgage was given for a valid consideration, *held*, that their verdict would not be disturbed upon appeal although there was some evidence which tended to show that the transaction was fraudulent: *First Nat. Bank v. Fenn*, 75–221.

The question as to the sufficiency of evidence which is wholly circumstantial as opposed to positive testimony is for the determination of the trial court or jury and their finding will not be disturbed upon appeal: *Cox v. Burlington & W. R. Co.*, 77–478.

Under the evidence in a particular case, *held*, that without dispute the amount of the verdict was excessive, and the judgment was reversed: *Miller v. Brown*, 82–79.

Where there is an absence of testimony as to an essential element of recovery (for instance, in an action for personal injuries, the freedom of the person injured from negligence), a judgment on the verdict will be set aside on appeal: *Tierney v. Chicago & N. W. R. Co.*, 51 N. W. R., 175.

Findings of court: The finding of facts by the lower court has the force and effect of a verdict of the jury and cannot be disturbed if more than one conclusion can be fairly drawn from the evidence: *State v. Intoxicating Liquors*, 76–243.

Findings of the lower court have the force and effect of a verdict, and will not be set aside unless they are so against the proof as to raise a presumption of passion or prejudice: *British Amer. Ins. Co. v. Neil*, 76–645.

The presumptions in behalf of the findings of a court are the same as those in regard to the verdict of a jury: *Pace v. Heinley*, 52 N. W. R., 124.

The appeal from the judgment in a proceeding by *certiorari* is regulated by the same rules governing appeals in ordinary actions, and the findings of the court therein have the same presumptions in their favor as the verdict of a jury: *Remey v. Board of Equalization*, 80–470.

The court cannot set aside the finding of commissioners in a proceeding to establish lost corners, and enter judgment contrary thereto, where there is evidence sufficient to support the finding of the commissioners: *Yocum v. Haskins*, 81–436.

V. Hearing and Determination of Appeal.

a. *Dismissal or Affirmance.*

For failure to file transcript, see notes to § 4410.

Where appellant's right has terminated, see notes to § 4442.

As the appellee may have the appeal dismissed for failure to assign errors, *held*, that the court would not dismiss on that ground, where no motion for dismissal had been made, and no objection had been taken to the sufficiency of the assignment until the close of the argument: *Smith v. Hill*, 49 N. W. R., 1048.

b. *Method of Trial of Appeal.*

In actions at law, see notes to § 3948.

In actions in equity, see notes to § 3949.

c. *Affirmance or Reversal in General; Remanding; Final Judgment.*

What reviewable: The fact that the district court gave as a reason for its judgment that certain mortgages amounted to a general assignment, when the true reason was that the conveyances were void as fraudulent, but not possessing all the elements of a general assignment, will not be ground for reversal upon appeal: *Wise v. Wilds*, 77–586; *Arnold v. Wilds*, 77–593.

On an appeal from a ruling sustaining a mo-

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tion to direct verdict for defendant, and refusing to direct verdict for plaintiff, the court can consider whether, under the pleadings and the evidence which appear in the record, error was committed: *Lindley v. Snell*, 80–103.

Mere abstract questions or those involving rights no longer existing will not be considered on appeal: *Potts v. Tuttle*, 79–253.

And see notes to §§ 4392 and 4442.

Remittitur: Where a judgment is found to be excessive and the party in whose favor it is rendered offers to remit the excess, the judgment will be modified accordingly: *Pelley v. Walker*, 79–142.

Decision binding on subsequent appeals: A decision on an appeal will be regarded as the law of the case governing on subsequent appeals: *Lewis v. Burlington Ins. Co.*, 80–259.

A decision upon an appeal will not be reviewed or reversed upon a second appeal: *Heffner v. Brownell*, 75–341.

Where in a prosecution for a nuisance defendant was convicted and on appeal to the supreme court the conviction was sustained, *held*, that in an appeal from the action of a judge in refusing to grant a writ of *habeas corpus* to release the same party from arrest in such case, the prior decision of the court would be considered binding: *Smith v. Foster*, 50 N. W. R., 220.

Entry of judgment: Where the facts are settled, the supreme court may enter such an order as the district court should have made: *In re Bresee*, 82–573.

Effect of judgment: Where parties to an action are not affected by a decree, not having an interest therein, they lose no rights by not appealing, and are not bound by such decree in a subsequent action: *Pierce v. Early*, 79–199.

Where judgment is rendered in the supreme court, and it is claimed that such judgment was rendered after the dismissal of the appeal and is for that reason erroneous, such error must be raised in the supreme court by motion to set the judgment aside, and cannot be urged in an injunction proceeding to prevent the enforcement of the judgment by execution: *Phelan v. Johnson*, 80–727.

Remand: Where a demurrer to a counter-claim was sustained and the case tried without regard to such counter-claim, but on appeal the ruling on demurrer was reversed, *held*, that the case would be remanded for trial upon the counter-claim, plaintiff's judgment in the former trial not being vacated, but the court below being directed to make proper order to delay its collection during the pendency of the action on the counter-claim: *Sherman v. Hale*, 76–383.

Procedendo: A motion having been made in the supreme court to remand the cause to the lower court with leave to introduce additional evidence, and overruled, the lower court should refuse to receive further evidence and render judgment accordingly: *Garmoe v. Windle*, 76–289.

d. *Trial of Equity Cases De Novo.*

As to method of trial in lower court so as to secure trial *de novo* on appeal, see notes to § 3949.

What triable de novo: A proceeding to establish a lost corner in a boundary of land is not triable *de novo* upon appeal: *Bohall v. Neiwalt*, 75–109.

The finding of the commissioner in such case will be regarded as the verdict of a jury, and the supreme court will determine whether the report has such support in the evidence that the action of the court in setting it aside and rendering judgment contrary thereto is erroneous: *Yocum v. Haskins*, 81–436.

The fact that an action in equity for an accounting is tried in the lower court by a referee does not affect the question as to the manner of trial on appeal: *Hubenthal v. Kennedy*, 76–707.

The action of the court with reference to the appointment of a guardian of the person and property of a minor is reviewable only on errors assigned: *Lawrence v. Thomas*, 51 N. W. R., 11.

An appeal from the district court, in proceedings to review the action of a board of equalization, is triable *de novo*: *First Nat. Bank v. City Council of Albia*, 52 N. W. R., 333.

In an action brought by a surviving partner against an administratrix to settle a partnership, where plaintiff's petition was dismissed as to his claim for affirmative relief, but the case was retained, requiring plaintiff to account for his trust as surviving partner, *held*, that the case could not be tried *de novo* upon appeal, because it remained in the court below for trial upon issues involving the rights of both parties and would therefore be remanded: *Smith v. Knight*, 77–540.

A party is entitled to have his case tried by a court of original jurisdiction, and where the judge is related within the prohibited degrees of consanguinity and attempts to dispose of the case without consent, he exceeds his jurisdiction and his acts are illegal, and the case will not be tried *de novo* upon appeal: *Chase v. Weston*, 75–159.

Where it appears by the record that in the trial below both the parties and the court regarded the action as an equitable one, and it was tried upon that theory, it will be so regarded and tried upon appeal: *Bryant v. Fink*, 75–516.

Where a case is tried in the lower court in equity it will be triable *de novo* on appeal even though the lower court has erroneously submitted an issue therein to the determination of a jury: *Frank v. Hollands*, 81–164.

What abstract must show: Where the case is triable *de novo*, and the abstract contains no part of the evidence, the appeal cannot be considered and the judgment will be affirmed: *Underwood v. Lombard Inv. Co.*, 50 N. W. R. 219.

A case will not be tried *de novo* on appeal where the abstract fails to show the evidence offered and rejected as well as that introduced: *Giltrap v. Watters*, 77–149; *Reed v. Larrison*, 77–399; *Second Nat. Bank v. Ash*, 51 N. W. R., 1160.

The fact that the abstract contains a certificate of the judge that the record contains all the evidence introduced or offered on the trial is not sufficient to enable the case to be tried *de novo*, it not appearing that all such evidence is in the abstract: *Walrod v. Flanigan*, 75–365;

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Parks v. Garner, 77-154; *Peoria Steam Marble Works v. Linesenmeyer*, 80-253; *Bailey v. Green*, 80-616; *Shattuck v. Burlington Ins. Co.*, 78-377; *Harper v. Gleystein*, 50 N. W. R., 548.

The supreme court cannot, even with the consent of counsel, try cases *de novo* unless the abstract shows that all the evidence is before the court: *Peoria Steam Marble Works v. Linesenmeyer*, 80-253.

Where the abstract claims to "fairly set out all the record material to the termination of this action," the court cannot try the case *de novo*: *Miller v. Terkeldsen*, 80-476.

In such case, *held*, that the decision below would be affirmed, although appellant in his argument in reply assigned errors, the court not having beeen asked to hear the appeal as a law action: *Ibid.*

Certificate of judge: Where the evidence appears to have been in writing certified by the judge of the court below, and the certificate of the judge shows that it was tried below as in equity, it will be tried *de novo* on appeal: *Ryan v. Heenan*, 76-589.

Unless the certificate of the judge shows that the reporter's notes and translation thereof contain all the evidence, or that all of the evidence was made of record, the case cannot be tried *de novo*. The certificate of the reporter to his notes and translation will not dispense with the judge's certificate: *Blanchard v. Devoe*, 80-521.

Where the evidence is not certified it will be stricken from the record on appeal: *Ibid.*

Further as to judge's certificate, see notes to § 3949.

Final determination: Where the defendant in an equity case relied upon the defense of a former adjudication which was determined in his favor, and the plaintiff appealed, *held*, that although the decision of the court with reference to such prior adjudication was erroneous, the case would not be remanded for new trial, but would be finally determined upon the evidence; and the plaintiff not having introduced the evidence showing his right to recover must fail: *Butterfield v. Wilton Collegiate Inst.*, 52 N. W. R., 845.

In such case the plaintiff has not the right on an issue of fact, where there is an affirmative defense pleaded, to try that issue, and if successful demand a further trial in the lower court on other issues presented: *Ibid.*

Where the members of the court, on a separate examination of the record, came to different results as to the amount which plaintiff was entitled to recover, but none of them reached a result more favorable to appellant than that reached in the court below, *held*, that the judgment should be affirmed: *Branhard v. Scott*, 76-773.

4428. Restitution of property.

Where certain stock was held by a bank as collateral security and was attached by other creditors, and it was found that the rights of the creditors were subject to those of the bank, and the judgment being afterwards reversed, the stock in the meantime depreciating in value, *held*, that the bank should restore not the amount paid for the stock but the substituted certificates, which was all it had received from the sale: *Ft. Madison Lumber Co. v. Batavian Bank*, 77-393.

4431. Rehearing.

The parties cannot, on rehearing, amend the record or present questions not before presented, unless under authority of the court: *McDermott v. Iowa Falls & S. C. R. Co.*, 52 N. W. R., 181.

4437. Assignment of errors.

When necessary: On an appeal from the decision of a court appointing a receiver, in accordance with the prayer of a petition in equity and the proofs thereunder, no assignment of errors is necessary: *Clark v. Raymond*, 50 N. W. R., 1068.

An equity case cannot be tried as a law case when no errors have been assigned: *Reed v. Larrison*, 77-399.

Where a case cannot be tried *de novo* because the abstract fails to show all the evidence, an assignment of error which can be determined only upon the evidence will not be considered: *Giltrap v. Watters*, 77-149.

What sufficient: An assignment of errors in the admission or exclusion of evidence need not embody the question. It is enough if it specifies the fact and states wherein the court erred: *Union Bldg. Ass'n v. Rockford Ins. Co.*, 49 N. W. R., 1032.

Where two of the twenty-nine grounds of a motion for a new trial were: First. "the verdict is contrary to law;" and second, "the verdict is contrary to the evidence," and the only reference to the grounds of the motion made in the assignment of errors was the following: "The court erred in not granting plaintiff's motion to set aside the verdict, arrest the judgment, and grant a new trial, for the reasons therein stated," *held*, that the assignment was too general to authorize a determination of the question upon appeal, as to whether or not the verdict was sustained by the evidence: *Duncombe v. Powers*, 75-185.

The assignment in a particular case that "the verdict over and above the actual damages . . . is not supported by the evidence," *held* sufficient: *Waller v. Waller*, 76-513.

Assignment of error in overruling a motion for a new trial based on several grounds is not sufficiently specific: *State ex rel. v. Harbach*, 78-475.

An assignment of errors, directed against all the instructions given by the court *en masse*, without specifying the particular errors complained of, is not sufficient: *Blair v. Madison County*, 81-313.

An assignment of error in sustaining a demurrer, where the demurrer presents differ-

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ent questions, is not sufficiently specific: *Blecker v. Schoff*, 48 N. W. R., 1079.

An assignment of error in overruling objections to the introduction of testimony shown in the abstract and objected to by defendant is not sufficiently specific: *Ibid.*

The court is not required to resort to arguments of counsel to show what questions are intended to be raised by the assignments; and *held*, that assignments that the judgment is against the evidence as shown by the agreed statement of facts, and that the judgment is against the law applicable to the facts, and that the court erred in rendering judgment for the plaintiff, were insufficient: *Smola v. McCaffrey*, 50 N. W. R., 16.

Assignments of error in particular cases considered: *Duncombe v. Powers*, 75–185; *Albrosky v. Iowa City*, 76–301; *Kaufman v. Farley Mfg. Co.*, 78–679.

Amendment: It is permissible to file an amendment to the assignment of errors in the furtherance of justice; and where it does not appear that the submission of the case to the court has been delayed, nor that the appellee has been in any manner prejudiced, such an amendment will not be stricken from the files on motion: *Hall v. Chicago, R. I. & P. R. Co.*, 51 N. W. R., 150.

4438. Motions.

Where it did not appear that a copy of the motion to dismiss the appeal had been served on appellant's counsel, *held*, that such motion could not be considered: *Morrison v. Springfield Engine, etc., Co.*, 51 N. W. R., 183.

Where there is no proof of service of a motion filed in the supreme court it will be disregarded: *Blasser v. Moats*, 81–460.

4441. Death of party.

Where, in an action to enjoin a liquor nuisance, suit was brought in the name of a citizen of the county, *held*, that upon his death the state might be substituted upon the application of a person duly authorized to represent the state: *Geyer v. Douglass*, 52 N. W. R., 111.

4442. Dismissal of appeal.

Where an appellant withdrew his appeal by serving notice of the withdrawal upon the appellee, but it was not dismissed in the supreme court and the judgment was affirmed, *held*, that such judgment was a final adjudication of the case and a second appeal could not be considered: *Trulock v. Friendship Lodge, K. P.*, 75–381.

To authorize the supreme court to consider an appeal there must be real present questions, involving actual interests and rights of the parties, and when in a case pending in the supreme court rights insisted upon cease to exist, the appeal will be dismissed. So *held* where, pending an appeal from an interlocutory order granting a temporary injunction, the action in the lower court was dismissed by plaintiff in the method authorized by statute: *Chicago, R. I. & P. R. Co. v. Dey*, 76–278.

4443. Showing of grounds for dismissal.

It being shown that the plaintiff has through his attorney accepted the benefit of the judgment in his favor, plaintiff's appeal should be dismissed: *Root v. Heil*, 78–486.

4444. Service of notice; return.

The provisions of this section with regard to returning notice after service are directory, and a failure to comply therewith will not affect the validity of the appeal: *Littleton Sav. Bank v. Osceola Land Co.*, 76–660.

CHAPTER 8.

CERTIORARI.

4446. When writ may issue.

Where a board of equalization acts without jurisdiction, the proper remedy is by *certiorari* to review their proceedings: *Rockafellow v. Board of Equalization*, 77–493.

In an action to prevent an insurance company from doing business in the state, notwithstanding that it had received a certificate from the auditor, on the ground that it was acting in violation of the law in such a manner as to forfeit its rights as a corporation, *held*, that *quo warranto* was the proper remedy to test the company's right to act; and not *certiorari* to review the act of the auditor in granting the certificate: *State v. Fidelity & Casualty Co.*, 77–648.

Certiorari, and not appeal, is the proper method of reviewing an action of a court providing or refusing to provide for the punishment of a party for contempt; and this is true whether the proceeding to punish for contempt

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is public or private: *Currier v. Mueller*, 79–816.

Where the court in an equitable action to redeem from a tax deed entertained a motion for a new trial made after the decision of the action without notice of such motion to the opposite party, *held*, that such action was without jurisdiction, and could be corrected by *certiorari* for the reason that the opposite party not having notice had not appeared to take exceptions, and could not have prosecuted an appeal: *Callahan v. Lewis*, 79–452.

The proper proceeding to arrest an attempt of a municipal corporation to unlawfully dispose of its property to the injury of its tax-payers is by injunction, which may be had at the suit of a non-resident tax-payer: *Brockman v. Creston*, 79–587.

A tax-payer may maintain a proceeding by *certiorari* to review an action of the board of supervisors whereby his taxes are wrongfully increased: *Goetzman v. Whitaker*, 81–527.

4447. By whom granted.

The only means of reviewing an order of a district court punishing for contempt is by *certiorari*, and the writ can only be granted in such case by the supreme court or one of its judges. The district court has not authority, therefore, to admit defendant to bail pending such proceedings: *State v. District Court*, 50 N. W. R., 677.

4450. Service and return.

The appearance of a party to a writ of *certiorari* cures any defect in the writ or in the service thereof: *Remey v. Board of Equalization*, 80–470.

4453. How prosecuted; appeal.

The appeal is regulated by the same rules as in an ordinary action and the findings of the court have the same presumptions in their favor as the verdict of a jury: *Remey v. Board of Equalization*, 80–470.

4454. Limitation.

It is not required that the return of the writ be made within the time herein provided if it is issued in time: *Remey v. Board of Equalization*, 80–470.

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TITLE XX.

PROCEDURE IN PARTICULAR CASES.

CHAPTER 1.

ACTIONS FOR THE RECOVERY OF SPECIFIC PERSONAL PROPERTY.

4455. Where brought; petition.

Plaintiff is not required to aver the place where the property is detained, and no issue on that question can be raised except by a motion to change the place of trial to the proper county: *Kelley v. Cosgrove*, 48 N. W. R., 979.

The objection that the petition is not verified cannot be made a ground to direct the jury to render a verdict for defendant, nor taken advantage of by motion in arrest of judgment: *Turner v. Younker*, 76–255.

Where plaintiff alleged the possession of the property to be in defendant, and that he was detaining it under the claim that he had purchased it, and defendant's answer denied the alleged ownership and right of possession of the plaintiff, and admitted that defendant owned the property, and alleged that defendant was unlawfully deprived of it by plaintiff, to defendant's damage, *held*, that the question as to whether defendant was the owner of the property was put in issue by the pleadings: *McIntire v. Eastman*, 76–455.

The controlling question under this section is plaintiff's right to possession, and defendant is entitled to no relief in such an action, except judgment for return of the property and the value of his right therein where it has been wrongfully taken from him by the writ: *Beroud v. Lyons*, 52 N. W. R., 486.

In an action of replevin demand of possession is required only where it is necessary to terminate the defendant's right to possession or confer that right on plaintiff: *Ruiter v. Plate*, 77–17.

Therefore, where property had been forcibly taken under a chattel mortgage alleged to be void, *held*, that if the mortgage was in fact void the taking was wrongful, and a demand for the return of the property was unnecessary: *Ibid.*

Where property was sold on trial, and promissory notes given for the purchase price, no part of which had been paid, in an action of replevin to recover the property, *held*, that no demand was necessary before bringing suit: *Peck v. Bonebright*, 75–98.

Where a horse, on which defendant claimed a lien, had been taken to plaintiff's stable, and the parties had then agreed that the settlement of the lien should be temporarily postponed, *held*, that defendant would not be protected in the possession of the animal taken from plaintiff's stable without permission: *Bray v. Wise*, 82–581.

Where the parties traded horses on Sunday and on the next day plaintiff tendered back the animal received by him, *held*, that he was not thereupon entitled to maintain replevin for the animal which he gave in exchange: *Kelley v. Cosgrove*, 48 N. W. R., 979.

In an action of replevin where the only evidence tending to show that the property was not in possession of defendant when the suit was begun was his statement that, in dividing his property after the demand of plaintiff for possession, his son took the property in controversy, *held*, that such evidence would not defeat the action: *Briggs v. McEwen*, 77–305.

An action of replevin may be maintained to recover possession of a draft which has been rendered void subsequently to its acceptance by reason of material alterations: *Smith v. Eals*, 81–235.

Where the rights of a chattel mortgagee to possession were subordinate to a claim under a landlord's lien, but the landlord's lien was satisfied before the trial of the case, and the court taxed the costs up to the time of the satisfaction of such lien to plaintiff and the subsequent costs to defendant, *held*, that such action was proper and that plaintiff was entitled to recover: *Hibbard v. Zenor*, 82–505.

The question as to the value of a team of horses being involved, *held*, that evidence as to the work it could do was admissible, particularly where defendant offered testimony as to the unsoundness of the horses. Also *held*, that such testimony was admissible as bearing on the use of the team under plaintiff's claim for damage: *Minthon v. Lewis*, 78–620.

The writ of replevin is not the lawful process for taking property from the possession of an officer holding it under a writ properly issued in a criminal proceeding. So *held* where it was sought to replevin intoxicating liquors from an officer holding them under search-warrant: *Lemp v. Fullerton*, 48 N. W. R., 1034.

4456. No counter-claim.

It is not the purpose of this provision as to counter-claim to prevent the recovery by defendant of the property which is in controversy, and damages for its detention. It is the policy of the law to settle the matter of title when it is involved, and the right of pos-

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session, and questions which arise therefrom, so far as may be done in one action: *McIntire v. Eastman*, 76–455.

Where defendant sought to have the return of the property taken by plaintiff under his writ, or the value thereof, *held*, that a claim on the part of defendant for the return of property not taken under the writ was a counter-claim, and therefore not allowable: *Chapin v. Garretson*, 52 N. W. R., 104.

Where the question was whether a chattel mortgage under which recovery of the possession was claimed had been satisfied by the execution of a warranty deed, *held*, that there was no equitable issue involved requiring the transfer of the case to the equity docket: *Beroud v. Lyons*, 52 N. W. R., 486.

Section applied: *Muir v. Miller*, 82–700.

4459. Bond.

In an action against the surety on a replevin bond, it appeared that the property consisted of machinery in the shaft of a mine, which remained in the same situation as when the writ of replevin was served. *Held*, that the offer or tender of the property by defendant to plaintiff in such situation was sufficient, and that the surety on the bond was not liable for failure of defendant to remove it from the mine or deliver it above ground: *Nimon v. Reed*, 79–524.

4462. Execution of writ.

The fact that the writ was served by a constable and not by the sheriff will not entitle the defendant to a return of the property: *Smith v. Eals*, 81–285.

4468. Assessment of value and damages.

In an action of replevin against a constable a third person claimed to own the property and intervened, and it appeared that the plaintiff agreed with the constable that there should be no judgment for damages or costs taken against him and that the property should be regarded as being in the hands of the court subject to a final determination as between the parties plaintiff and intervenor, and that the officer be discharged from the case. *Held*, that such agreement did not have the effect to release the plaintiff from liability to the intervenor on account of the use and detention of the property, which had been in his possession for a long time: *Van Horn v. Overman*, 75–421.

4469. Form of judgment.

In an action of replevin where the record showed that a certain part of the property levied upon had been released, and judgment was rendered for plaintiff for the "possession of the property in controversy," *held*, that while the judgment would have been more definite and certain if it had specifically described the property in controversy, yet, as the record sufficiently indicated and pointed it out, the judgment would not be reversed: *Coleman v. Reel*, 75–304.

Where certain property was sold on trial and promissory notes given for the purchase price, no part of which had been paid, in an action of replevin to recover the property, where there was a general verdict for the defendant, *held*, that a motion for a new trial was properly sustained, as the value of defendant's interest in the property could not be assessed on the general verdict: *Peck v. Bonebright*, 75–98.

Where plaintiff seeks to recover the value of the property he may also have damages for its detention: *Turner v. Younker*, 76–255.

Notwithstanding the provision of § 4556, prohibiting a counter-claim in this action, *held*, that where defendant set up title to the property, and that he had been deprived thereof by the plaintiff, and asked judgment for the value of the property and damages for its detention, the relief asked by the defendant was authorized by this section: *McIntire v. Eastman*, 76–455.

CHAPTER 2.

ACTIONS FOR THE RECOVERY OF REAL PROPERTY.

4476. What interest recovered.

A party seeking to redeem in equity from a tax deed should bring his action under § 1378 and not under this section: *Callanan v. Lewis*, 79–452.

4477. Title.

Plaintiff must recover on the strength of his own title and the burden is upon him to show that it is superior to that of defendant: *McCarty v. Rochel*, 52 N. W. R., 361.

Where plaintiff's title is admitted by defendant's answer he is relieved from showing title: *Heinz v. Cramer*, 51 N. W. R., 173.

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4478. Tenant in common.

Where one tenant is a disseisor of his cotenant, he becomes liable to an action for rents and for waste: *Dodge v. Davis*, 52 N. W. R., 2.

4481. Abstract of title.

Where a plaintiff, seeking to quiet his tax title as against claimants under the patent title, set out an abstract showing deeds in a chain of title to defendant, and defendant, seeking relief against the plaintiff's tax title, adopted such abstract, but it appeared therefrom that defendant's deed was executed by certain grantors claiming to be the heirs of the holder of the patent title, it not appearing that such previous holder of the title was dead or that said grantors were his heirs, *held*, that the showing of title was not sufficient to authorize relief to defendant as against such tax title: *Kreuger v. Walker*, 80–783.

4494. Liability of tenant.

This section relates to actions for the recovery of real estate and does not apply in an action by the purchaser under a sheriff's deed to recover from the tenant in possession under an inferior title for the wrongful conversion of pasturage and crops: *Stanbrough v. Cook*, 49 N. W. R., 1010.

4498. New trial.

Where action was brought in equity to redeem land from tax sale and deed on the ground that no notice of the expiration of the time to redeem was given, *held*, that a motion for new trial in such action was brought under § 1373, and not in pursuance of the provisions of this section, and that therefore notice of such motion was required: *Callanan v. Lewis*, 79–452.

4503. Action to quiet title.

A claimant of swamp lands by conveyance from the state may maintain this action to determine and quiet his interest, and is not limited to a remedy by application to the commissioner of the general land office and secretary of the interior: *Snell v. Dubuque & S. C. R. Co.*, 78–88.

The legatee of real property may maintain an action to quiet his title against the widow of testator claiming dower therein, when by reason of an ante-nuptial contract the widow has surrendered her dower right: *Peet v. Peet*, 81–172.

A plaintiff who is in actual possession, so that he cannot maintain ejectment, may still bring an action in equity to quiet his title, although an ejectment suit against him by other claimants is pending: *Langstraat v. Nelson*, 40 Fed. R., 783.

So far as this section attempts to give an equitable remedy in cases where there is a legal remedy it is not applicable in the federal courts so as to extend the equitable jurisdiction of those courts and deprive a party of a jury trial: *Whitehead v. Shattuck*, 138 U. S., 146.

Where the evidence showed a contract between the defendant and plaintiff, who were father and son, by which defendant agreed orally with the plaintiff that plaintiff should remain and labor on defendant's farm and receive one-half of the land therefor, and a subsequent settlement with plaintiff in which it was agreed that plaintiff should have the tract in controversy, to be conveyed to him, and plaintiff went into possession thereof and improved the same, claiming right and title thereto, *held*, that the court properly quieted the title of the premises in plaintiff: *Quinn v. Quinn*, 76–565.

Under the facts of a particular case, *held*, that defendant having acquired his title after the commencement of the action and after the adverse claimant had been in possession for eight years, the title was properly quieted against him: *Soukup v. Union Inv. Co.*, 51 N. W. R., 167.

A title acquired by adverse possession is sufficient to entitle the party to have the title quieted as against adverse claimants: *Cramer v. Clow*, 81–255.

A railroad company to which land has been granted on condition may, after complying with the conditions of the grant, maintain an action to quiet the title, although no certificate or patent of the land has been issued to it: *Cole v. Des Moines Valley R. Co.*, 76–185.

In a particular case, *held*, that the title of the plaintiff was established as against that of the defendant, and that there were no laches on plaintiff's part such as to defeat his right to have his title quieted: *Chase v. Kaynor*, 78–449.

Where plaintiff was negligent for more than thirty years before bringing action to quiet title, *held*, that his long delay in bringing the action, with knowledge of the adverse acts of those claiming under an unrecorded mortgage, given before he acquired title, would raise a strong presumption against him, and he would not be allowed to assert his claim adversely to those holding under the mortgage: *Witherow v. Walker*, 81–651.

Where a party had made redemption from a tax sale, receiving a certificate thereof, *held*, that he was not guilty of laches in paying no attention to memoranda charging him with notice that another party had paid taxes or had a tax deed: *Burke v. Cutler*, 78–299.

Under particular circumstances, *held*, that persons who became owners of land as heirs, during minority and while non-residents, were not guilty of such laches as to defeat their right to have their title to the land quieted, nothing having been done by them tending to mislead others as to their rights: *Carnes v. Mitchell*, 82–601.

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Where it appeared that the adverse claimant in such case had expended money in protecting the title to the property, *held*, that it did not appear that the claims which were satisfied were claims which would have prevailed against plaintiffs' title, and that therefore plaintiffs were not chargeable with such expense: *Ibid.*

In an action to quiet title, where plaintiff's abstract stated that the deeds of conveyance from a certain grantor through intermediate grantors to plaintiff were introduced in evidence, and where such statements were denied by the appellee, *held*, that as there was an abstract of title showing the conveyances as claimed, and oral evidence on the trial, to which there was no objection, by which it was admitted or plainly shown that plaintiff held by a regular chain of conveyances from said grantor, it was unnecessary for plaintiff to introduce the deeds in evidence, and the appeal would not be dismissed because of failure to do so: *Cassidy v. Woodward*, 77-354.

In an action to quiet title and for general relief the court may give plaintiff a money judgment, if that appears to be the relief to which he is entitled: *Iler v. Griswold*, 49 N. W. R., 1023.

4506. By equitable proceedings.

In an action in chancery to quiet title the recovery of possession of the property may be awarded by the decree: *Wyland v. Mendel*, 78-739.

Where plaintiff alleges a fee-simple title and claims to recover possession and his petition is not denied, there is sufficient showing for rendering decree in his favor for the quieting of his title and the recovery of possession: *Ibid.*

In an action to quiet title the claim of an easement should be set up: *Smith v. Baldwin*, 52 N. W. R., 495.

4508. Permanent survey; lost corners.

These provisions are applicable to boundaries and corners on county lines, and the adjacent tracts may or may not be in the same county as that of the petitioning proprietor: *Tooman v. Hidlebaugh*, 49 N. W. R., 79.

In a proceeding to establish a lost corner where the evidence was conflicting as to the location of the corner, *held*, that the rule in such cases is that courses and distances designated by the field survey must yield to fixed monuments: *Walrod v. Flannigan*, 75-265.

In a proceeding under these statutory provisions to establish a corner, all the property owners affected thereby are not necessary parties: *Rollins v. Davidson*, 50 N. W. R., 1061.

The true corners are where the United States surveyors in fact established them, whether such location is right or wrong, as shown by subsequent surveys. Therefore, evidence is admissible tending to show the presence of monuments at points claimed to be the section corners, and other monuments in the township, from which to ascertain and locate those in question: *Ibid.*

Misjoinder of parties will not defeat the action: *Ibid.*

When the corner as fixed by the government surveyor is found, or the place of its location identified, that will control, regardless of the fact that the actual location of the corner may result in deflecting the section line from a straight course between the government corners located east and west of the supposed lost corner. This proceeding is not instituted for the purpose of straightening lines, but it is to ascertain the location in fact of the government corner: *Doolittle v. Bailey*, 52 N. W. R., 337.

A proceeding to establish a lost corner is not triable *de novo* upon appeal, and the finding of the trial court will not be set aside for want of evidence, where the evidence is conflicting: *Bohall v. Neiwalt*, 75-109.

On an appeal from the judgment of a court establishing a lost corner, the report of the commissioner will be regarded as the verdict of a jury, and in determining whether the court properly set aside such report, and entered judgment in accordance therewith, the supreme court will determine whether there was such lack of evidence to support the finding of the commissioner as to justify the court in setting it aside: *Yocum v. Haskins*, 81-436.

Evidence in such a case as to the identification of a particular corner considered: *Ibid.*

Order in a case appointing a commissioner to make a survey, etc., *held* proper, although defendant claimed adverse possession up to the line insisted upon by him: *Plank v. Reinhart*, 81-756.

4510. Proceedings in court.

The court may set aside the conclusions of a commissioner and reach a different result from that of the commissioner, if it has the testimony before it. Under such circumstances it would not be proper to refer the case back to the commissioner: *Doolittle v. Bailey*, 52 N. W. R., 337.

In a proceeding to establish a lost corner the costs should be apportioned among all the parties according to their interests, and not according to the benefits which result from the suit: *Bohall v. Neiwalt*, 75-109.

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CHAPTER 3.

PARTITION.

4511. By equitable proceedings.

Where one of three tenants in common, believing himself to be the sole owner of a certain tract of land, made valuable improvements thereon and occupied the same undisturbed for twenty years, in an action for partition, *held*, that he was entitled to the value of the improvements as against the other tenants: *Killmer v. Wuchner*, 79–722.

In an action for partition where one of several co-plaintiffs dismissed the action as to herself, having sold her interest in the property, but, notwithstanding the dismissal, judgment was ordered confirming the shares as alleged and for partition, *held*, that the plaintiff dismissing was not a party when the order for partition was made and was not bound thereby, and her assignee would not be bound merely by virtue of the assignment: *Ocheltree v. Hill*, 77–721.

A partition of the lands of an estate should not be ordered until it is determined that the personal estate is sufficient to pay the debts, but an action may be commenced before that time, and if it does not appear, when partition is made, that it will be necessary to resort to the real estate to pay the debts, the decree partitioning the lands will not be disturbed: *Snyder v. Snyder*, 75–255.

4513. Title.

Where defendant claims under the same title as that asserted by plaintiff, he cannot question plaintiff's right to relief on the ground of the want of a sufficient showing of title: *Shane v. McNeill*, 76–459.

4521. Undivided interests.

A party who has acquired a lien on an undivided interest in the property may be made a party to the proceeding, but where a creditor had, pending the partition proceeding, levied an attachment on an undivided interest in the property and had recovered judgment and bought in such undivided interest at execution sale under the judgment, *held*, that he was not a mere lienholder entitled to reimbursement out of the proceeds of the sale of the property which was to be partitioned (partition having proved impracticable), but was entitled as owner to the entire share falling to the person whose interest he had bought: *Aplington v. Nash*, 80–488.

4523. Confirmation.

In a partition suit, where the court did not acquire jurisdiction of all the parties interested in the real estate, *held*, that the proceedings were not void or voidable as to those who were actually or constructively in court: *Williams v. Westcott*, 77–332.

Where certain parties to the suit acquiesced in the proceedings by accepting and receipting for their share of the proceeds, *held*, that one to whom they had conveyed their interest in the land, who had knowledge of the facts, was estopped from questioning the validity of the proceedings: *Ibid.*

CHAPTER 4.

FORECLOSURE OF MORTGAGES.

4543. Of personal property.

After the death of a mortgagor of chattels the mortgagee is not required to file his claim and await the slow process of administration to determine his rights, but he may proceed to foreclose by notice and sale, just as he could have done had the mortgagor survived: *Cocke v. Montgomery*, 75–259.

The law providing that only registered pharmacists shall sell drugs has no reference to sales of stocks of goods under foreclosure or judicial sale: *Ibid.*

4553. How validity contested.

Where it is sought to recover possession of property under a chattel mortgage and the defense is that the mortgage has been satisfied by the execution of a warranty deed for real estate, the case is not one in which the court acquires equity jurisdiction by reason of the action as to the chattel mortgage, the foreclosure thereof not being asked: *Beroud v. Lyons*, 52 N. W. R., 486.

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4557. Of real property; judgment; sale and redemption.

A provision in a mortgage that upon default in the payment of instalments of interest or taxes the whole indebtedness shall become due is for the benefit of the mortgagee at his election, and such default will not set the statute of limitations running against the indebtedness in the absence of an election on the part of the mortgagee to take advantage of such provision: *Watts v. Creighton*, 52 N. W. R., 12.

Where suit was brought to foreclose a mortgage as to one of the notes secured thereby, and at the end of the decree of foreclosure it was ordered that plaintiff's lien upon the property for the notes not yet due should be preserved, *held*, that such decree was effectual to preserve the lien of the mortgage: *Burroughs v. Ellis*, 76–649.

Where action to foreclose a mortgage was brought against the mortgagor and those who, it was alleged, claimed liens against the premises, and as to the lienholder, by reason of want of service, no judgment was rendered until after the sale of the property under decree of foreclosure and expiration of the period for redemption, *held*, that the only right of such lienholder was to redeem within the statutory period after judgment was entered against him, and that he could not after the expiration of such period maintain an action in equity against the grantee of the purchaser at the sale to redeem from such sale, improvements having in the meantime been made on such premises by the purchaser: *Lindsey v. Delano*, 78–350.

Where a mortgage is given to secure notes coming due at different times, the notes have priority in the order of their maturity; and this rule is applicable even though there be a provision in the notes that the holder may elect to treat them all as due upon failure to pay any one of them at maturity. The holder of a subsequent note cannot, by treating it as falling due upon failure to pay prior notes, entitle himself to a *pro rata* share of the security: *Leavitt v. Reynolds*, 79–348.

The lessee of one holding under a sheriff's deed executed in pursuance of the foreclosure of a junior mortgage is subject to the rights of a subsequent purchaser of the premises under the foreclosure of the senior mortgage, and can be held to account to the latter for the pasturage and crops converted by him, after the time when the purchaser under the foreclosure of the senior mortgage became entitled to possession. The fact that such lessee is not made a party to the foreclosure of the senior mortgage will be immaterial where his lease is taken pending the foreclosure proceedings: *Stanbrough v. Cook*, 49 N. W. R., 1010.

Where a mortgagor conveys a part of the mortgaged property, and retains the ownership of a part, the portion which he continues to own is to be sold first, and the part conveyed by him, in the hands of his grantee or those claiming under him, will be subject to sale only to satisfy the balance remaining after the sale of the property held by the mortgagor: *Mickley v. Tomlinson*, 79–388.

As between a purchaser at foreclosure sale and a tenant of the mortgagor, the tenant is entitled to crops grown by him on the premises and already matured but not severed at the time of the sale: *Richards v. Knight*, 78–69.

In a particular case, *held*, that a crop of corn was so far matured in August as to be the property of the tenant within the foregoing rule, it appearing that the season was an unusually early one: *Ibid.*

In an action by a junior lienholder who had not been made a party to foreclosure proceedings under which the land was sold, *held*, that the purchaser of the land at the sale under foreclosure had a right to maintain a cross-action to compel or bar redemption, although the land had previously been sold to other parties: *Anderson v. Wyant*, 77–498.

Where a mortgage was given to secure several notes, and the mortgagee without the consent of the mortgagor assigned the notes last falling due and an interest in the mortgage to secure the same to plaintiff, making the interest assigned the first lien on the premises, and where the mortgage was foreclosed as to the notes first falling due, and the interest of the plaintiff recognized as the superior lien, the mortgagee purchasing the property at the foreclosure sale for just sufficient to satisfy his judgment, from which the grantee of the mortgagor redeemed, *held*, that the lien of the mortgage was not exhausted by the foreclosure and sale, and the interest of plaintiff was superior to that of one holding as grantee of the mortgagor: *Morgan v. Kline*, 77–681.

Parties to an action for foreclosure may stipulate that a sale of land upon the judgment to be rendered therein shall be absolute and without redemption, and a sale and deed under such a decree will pass the title to the purchaser free from the claims of any person not having liens upon the property: *Cook v. McFarland*, 78–528.

In an action in equity to redeem from a decree of foreclosure and sale thereunder of mortgaged property on the ground that plaintiff was not served with notice of the foreclosure proceeding, the fact that he had knowledge of the sale in ample time to have made statutory redemption therefrom if he had wished to do so, and that he, without objection, allowed the purchaser at the foreclosure sale to make valuable improvements on the premises, would estop him from having equitable relief. Under the facts in the case, *held*, that the plaintiff in the foreclosure proceeding was justified in believing that the owner of the property had abandoned all claim thereto: *Schlawig v. Fleckenstein*, 80–668.

4559. Assignment to junior incumbrancer.

Where the holder of a junior mortgage, while suit for the foreclosure of a senior mortgage is pending, pays the amount of the mortgage debt with interest and costs, the transaction is not a sale but an equitable assignment, and the junior lienholder is entitled to be subrogated to all the rights of the holder of the senior mortgage: *Sessions v. Kent*, 75–601.

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4565. Foreclosure of title bond.

Where a party having a mortgage on land takes as additional security a deed for the same land, and gives back a bond to reconvey upon payment of sum named, the lien of his mortgage does not merge in the title thus acquired: *McElhaney v. Shoemaker*, 76–416.

CHAPTER 5.

ACTIONS FOR NUISANCE, WASTE, AND TRESPASS.

4567. What constitutes nuisance.

As a general rule a public nuisance gives no right of action to a private person, unless he suffer a special injury, distinct from that of the general public, and a municipal corporation is not authorized to bring an action to restrain and abate a nuisance on the ground that it is injurious to its citizens: *Ottumwa v. Chinn*, 75–405.

Independently of statutory provisions, a private individual will not be allowed to maintain an action to restrain or abate a public nuisance, unless he can show that it occasions some peculiar and special damage or injury to him; and where a railroad bridge was built across a navigable lake, and plaintiff subsequently established the business of keeping boats for hire at one end of the lake, *held*, that he could not maintain an action for damages against the company on account of the maintenance of such bridge, and consequent interference with his business, by reason of the obstruction to the passage of boats to other portions of the lake: *Innis v. Cedar Rapids, I. F. & N. W. R. Co.*, 76–165.

A land-owner has a private right of action for damages and for abatement of a nuisance caused by the obstruction of a highway which is of special importance to him in connection with entering and leaving his premises: *Miller v. Schenck*, 78–372.

A nuisance resulting in injury to the health and property of plaintiff may be a ground of recovery, although plaintiff is not affected in a different way in that respect from the public in general: *Harley v. Merrill Brick Co.*, 48 N. W. R., 1000.

In an action for damages for a nuisance consisting in smoke and soot caused by defendant in the operation of its works, *held*, that it was erroneous to instruct the jury that defendant would not be liable for such nuisance if caused in part by others. In such case, if it appears that defendant acted independently and not in concert with others, it should be held liable for the damages resulting from its own acts only: *Ibid.*

Also *held*, that the plaintiff was not estopped from complaining because of knowledge of the erection of defendant's works without making objection, it appearing that plaintiff had in no way induced defendant to act in reliance on plaintiff's acts or omissions: *Ibid.*

In such case, *held*, that it was not competent to establish the existence of the alleged nuisance by showing how it affected persons and property not in controversy: *Ibid.*

Where the owner of a rock quarry allowed rock to roll or fall upon a street, and it was used by the city in making repairs, *held*, that while the city had the right to remove such obstruction as a nuisance, yet if it used the material on its streets, not merely for the purpose of removing the obstruction but for the purpose of the betterment of the street, it was liable to the owner for the value of the material, less the expense of the removal: *Kemper v. Burlington*, 81–354.

The order of a city council as a board of health declaring a structure a nuisance and dangerous to public health is not conclusive in an action against the person maintaining such structure by one who claims to be injured thereby, and does not relieve plaintiff in such action from the necessity of establishing the fact that such structure is a nuisance working injury to plaintiff or his property: *Kallsen v. Wilson*, 80–229.

Therefore, a private individual is not entitled by action of *mandamus* to compel the defendant, a school board, to abate on their premises a building which has been declared by the board of health to be a nuisance to the public: *Ibid.*

In an action to recover damages caused by a nuisance, *held*, that the fact that plaintiff maintained another nuisance would not defeat his right of recovery, but that such fact might be considered in determining defendant's liability; and *held* also, that the doctrine of contributory negligence would not apply in such case: *Randolf v. Bloomfield*, 77–50.

In an action to recover damages caused by a sewer which emptied into the street near plaintiff's dwelling-house, evidence that another sewer of similar construction and use did not produce offensive smells, *held* properly excluded: *Ibid.*

Where an upper owner contributes to the pollution of a stream already polluted by others, and it appears that the water would have been good for stock and free from noxious odors but for such contribution, he will be liable in damages to the lower owner: *Ferguson v. Firmenich Mfg. Co.*, 77–576.

But where a stream is polluted by both upper and lower owners, the latter cannot recover for an injury to which he contributed: *Ibid.*

Where the upper owner, by an unreasonable use of a stream, pollutes the water so that it is rendered unfit for the use of stock and domestic purposes on the farm below, and is

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a source of sickness, pain and discomfort, the person injured is not limited in his recovery to the damages sustained by reason of the depreciation of the rental value of the property, but he is entitled to recover special damages for the inconvenience suffered by himself and family, including that resulting from sickness, pain and discomfort: *Ibid.*

In an action to recover for a nuisance caused by defendant by constructing and maintaining a sewer which emptied near plaintiff's dwelling-house, *held*, that plaintiff was not limited in his recovery to damages resulting from the depreciation in the rental value of the property, but was entitled to recover for the inconvenience and discomfort suffered: *Randolf v. Bloomfield*, 77-50.

The obstruction of a stream by which lands are inundated is a nuisance, and may be enjoined without regard to the insolvency of the defendant: *Moore v. Chicago, B. & Q. R. Co.*, 75-263.

4571. Trespass; treble damages.

Under the facts of a particular case, *held*, that plaintiff was entitled to treble damages for trespass although defendant claimed title, and the act of defendant seemed to have been committed for the purpose of causing a litigation which should establish the right to the premises: *Wilson v. Gunning*, 80-331.

CHAPTER 6.

ACTIONS TO TEST OFFICIAL AND CORPORATE RIGHTS.

4581. For what causes.

In an action to prevent an insurance company from doing business in the state, notwithstanding that it had received a certificate from the auditor, on the ground that it was acting in violation of the law in such a manner as to forfeit its rights as a corporation, *held*, that *quo warranto* was the proper remedy to test the company's right to act; and not *certiorari* to review the act of the auditor in granting the certificate: *State v. Fidelity & Casualty Co.*, 77-648.

Where two school directors had been elected in a district which was entitled to but one, *held*, that in a civil action in the nature of a *quo warranto* to test their rights, it was not necessary to make the district, the inhabitants thereof, or the directors, parties to the action: *State v. Simpkins*, 77-676.

This is an action at law, and appeal therefrom is not triable *de novo*. If the finding of the lower court has support in the evidence it will not be disturbed: *State v. Gaston*, 79-457.

CHAPTER 8.

ACTIONS OF MANDAMUS.

4609. Nature of action.

Where a county auditor refused to make certain corrections in a tax list, reducing the valuation of property according to the direction of the board of equalization, *held*, that owners of real estate who had not yet paid their taxes might proceed against the auditor by *mandamus* to compel him to make the required correction: *Ridley v. Doughty*, 77-226.

An action of *mandamus* against a district township to compel it to furnish school facilities to certain territory is a proper method of determining whether such territory is part of the school district: *Hancock v. District Township*, 78-550.

The state executive council being charged with the duty of letting a contract for the publication of state reports, *held*, that their action in awarding the contract to one bidder, and refusing to award it to another who claimed to have made a lower bid, could not be set aside under *mandamus* proceeding. Such an action is in effect an action against the state: *Mills Publishing Co. v. Larrabee*, 78-97.

Where it would be of no practical effect, or where there is no right to relief shown which could not be granted in the ordinary course of the law, the writ of *mandamus* will not issue: *Potts v. Tuttle*, 79-253.

Therefore, *held*, that the writ would not issue for the purpose of placing a party in office after the expiration of the term for which he was elected: *Ibid.*

In a particular case, *held*, that the action of the board of directors of a school district with reference to the removal of a school-house from one district to another could not be controlled by *mandamus*: *Peters v. Warner*, 81-335.

Where a county treasurer has collected railroad aid taxes and paid the amount over to the railway company and then gone out of office, *mandamus* will not lie against the board

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of supervisors to compel them to order the refunding of the taxes by the county treasurer or by the person who was formerly county treasurer to the tax-payers under the claim that the tax has been forfeited, the money thus collected not having been paid into the county fund nor used by the county: *Eyerly v. Board of Supervisors*, 81-189.

In a particular case, *held*, that as plaintiff could obtain no relief which would not be afforded in the ordinary course of the law the writ was properly denied: *Ibid.*

CHAPTER 9.

INJUNCTIONS.

4622. Grounds for.

Courts of equity will not interfere by injunction to prevent a mere trespass unless the right invaded or the act threatened is of such a character that such interference appears to be necessary for the prevention of an irreparable injury. If the party may be fully protected or indemnified by the ordinary processes of the law, the courts will remit him to the remedy thus afforded: *Thomas v. Farley Mfg. Co.*, 76-735.

Where plaintiff sought to enjoin defendants from prosecuting *ad quod damnum* proceedings to recover the value of certain lands occupied in the construction of plaintiff's railroad, *held*, that plaintiff had an adequate remedy at law, as all questions involved in the issue could have been determined in the *ad quod damnum* proceeding: *Keokuk & N. W. R. Co. v. Donnell*, 77-221.

An action for an injunction may be maintained against a railway company which maintains its track over the streets of a city without having paid the damages to abutting property owners, and the fact that such property owner has brought an action at law to recover such damages and recovered judgment therein will not prevent his having a remedy by injunction: *Harbach v. Des Moines & K. C. R. Co.*, 80-593.

In an action in equity to enjoin defendant from removing fences and traveling over the premises of plaintiff under the claim of a highway, *held* that, in order to avoid a multiplicity of suits, plaintiff was entitled to relief by injunction, regardless of defendant's solvency or insolvency: *Ladd v. Osborne*, 79-93.

Destruction of trees may be an irreparable injury in such sense that injunction will lie to prevent such threatened trespass. So *held* where one of two owners of adjoining property threatened to cut down trees growing on the boundary line and therefore owned by the two in common: *Musch v. Burkhart*, 48 N. W. R., 1025.

Where plaintiff was entitled to a supply of gas for specified purposes for a limited time by contract with a gas company, and the company was threatening by reason of alleged violation of the contract in the excessive use of gas to cut off the plaintiff's supply entirely, *held* that, as the plaintiff was entitled to the supply for proper purposes, the damage from shutting off such supply would be irremediable and he was entitled to an injunction: *Graves v. Key City Gas Co.*, 50 N. W. R., 283.

Where it appeared that defendant had without right obstructed an outlet to a lake so as to increase the height of water therein, and caused the plaintiff's land to be overflowed, *held*, that an injunction against the further maintenance of such obstruction was properly granted: *Groe v. Larson*, 51 N. W. R., 179.

And *held*, that it was immaterial whether the obstruction thus erected by defendant was on the land of defendant or not: *Ibid.*

Where there were conflicting entries of public land, *held*, that the widow of the claimant in possession in her own interest as the guardian of minor children might maintain an injunction to protect such possession against interference by the adverse claimant, pending an appeal to the secretary of the interior, with reference to the right to the property: *Wood v. Murray*, 52 N. W. R., 856.

And in such case *held*, that there was proper ground for equitable relief, there being no adequate remedy at law: *Ibid.*

The fact that a judgment creditor, about to sell lands under execution, publicly asserts that his claim is prior to that of a mortgage on the premises, and that such mortgage is fraudulent, is not a ground on which to enjoin his sale at the suit of the mortgagee: *Ramsdell v. Tama Water Power Co.*, 51 N. W. R., 245.

Where a county auditor refused to make certain corrections in a tax list, reducing the valuation of realty according to the direction of the board of equalization, *held*, that the remedy of the owners of property who had not paid their taxes was by *mandamus* and not by injunction: *Ridley v. Doughty*, 77-226.

The court has no power to interfere by injunction to prevent legislation by a city on a subject within its power to legislate; but if such legislation will be in excess of its powers the court may interfere. So *held*, where it was alleged that a city was about to pay, out of its general revenues, rental claimed by an electric light company under a contract which was not made in the method authorized by law: *Hanson v. Hunter Electric Light Co.*, 48 N. W. R., 1005.

An injunction will not be granted to restrain the board of supervisors from considering a petition for the relocation of a county seat on the ground that such petition is fraudulent. The board of supervisors has exclusive jurisdiction in such a proceeding: *Lucas v. Fensler*, 52 N. W. R., 517.

A tax-payer (whether resident or non-resident) may maintain an action for an injunction

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tion against a city to prevent it from making an unlawful disposition of city property: *Brockman v. Creston*, 79–587.

A tax-payer may maintain an action in his own name to prevent unlawful acts by public officers which would increase the amount of taxes which he is required to pay, or diminish a fund to which he has contributed: *Snyder v. Foster*, 77–638.

Where an action was brought to enjoin the cutting of timber on mortgaged premises, and a temporary injunction was granted, but a final hearing was not had until after the property had been sold on foreclosure and bought for the full amount of the mortgage debt and interest by the mortgagee, *held*, that the injunction was properly dissolved and the petition dismissed, there being no reason why it should be continued during the time for redemption, as it appeared that the timber was cut under an agreement that it should be sold and the proceeds applied on the mortgage, and it did not appear that the defendant had any intention to cut any more; and the fact that the proceeds of the timber had not been applied on the mortgage was immaterial, since plaintiff had bought the land for the full amount of the debt and costs: *Ellison v. Smyth*, 75–570.

Where an injunction has been already granted, a second injunction will not be granted to obtain the same object as the first while the first is in force: *Dickinson v. Eichorn*, 78–710.

4624. Temporary; when allowed.

To warrant the allowance of the writ, some act must be done or threatened which would produce great and irreparable injury to plaintiff, and is in violation of his right respecting the subject of the action, or which would tend to render ineffectual any judgment he might recover in the proceedings. It is not proper, therefore, to allow a preliminary injunction where the relief demanded consists in rescission and cancellation of a contract on the ground of fraudulent purposes of the officers of a corporation in entering into such contract, or that the steps necessary to bind the corporation have never been taken, such facts being available in defense of an action at law on the contract: *Dubuque & S. C. R. Co. v. Cedar Falls & M. R. Co.*, 76–702.

It is not necessary in order to entitle the party to a temporary injunction that it shall appear that the injury assigned would be irreparable. It is sufficient if such injury would be great: *Price v. Baldauf*, 82–669.

An injunction in aid of *quo warranto* proceedings brought in the name of the state should not be issued, as there are no proper parties to execute an injunction bond: *State v. Simpkins*, 77–676.

4628. Effect of refusal.

Where an application for a preliminary injunction has been refused, such refusal will not preclude the granting of an injunction on a subsequent application presenting a different case: *Graves v. Key City Gas Co.*, 50 N. W. R., 283.

4631. Bond; damages.

In order to recover damages on an injunction bond it is necessary that it should appear that the plaintiff was prevented by the injunction from exercising or enjoying some right or privilege which he desired to exercise and which he was entitled to enjoy. If the petition does not contain any averment that such damages were sustained by being deprived of some right, a demurrer thereto will lie: *Hibbs v. Western Land Co.*, 81–285.

Where the injunction has been improperly issued the defendant is entitled to at least nominal damages, though he has suffered no special injury: *Brown v. Cunningham*, 82–512.

Expenses necessarily incurred for attorney's fees in defending against an injunction suit may be recovered in an action on the injunction bond, when the proceeding is for an injunction alone and a motion to dissolve the injunction would have involved the whole case, and if sustained would have left nothing to try: *Thomas v. McDaneld*, 77–801.

When an injunction is the only relief sought and the dissolution is procured on a final hearing, necessary costs and expenses in procuring the dissolution are recoverable: *Bullard v. Harkness*, 49 N. W. R., 855; *Colby v. Meservey*, 52 N. W. R., 499.

Where by injunction a creditor is restrained from selling land on execution, thereby being prevented from buying it in for his claim, he cannot recover by way of damages the value of the use of the land for the time he claims to have been kept out of possession, nor interest on the value: *Ibid.*

Where a temporary injunction was granted in an action for a permanent injunction, and pending an appeal from the refusal of the court to dissolve such injunction the original action was dismissed by proper proceedings in the lower court, *held*, that the supreme court could not retain jurisdiction of the appeal for the purpose of assessing damages on the bond: *Chicago, R. I. & P. R. Co. v. Dey*, 76–278.

4632. To restrain judgment.

When a judgment is absolutely void by reason of want of notice whereby jurisdiction is not acquired, an action to cancel it may be brought in any court of competent jurisdiction as well as in the court in which it was rendered, or in any other court in the county wherein the court was held which rendered the void judgment: *State Ins. Co. v. Waterhouse*, 78-674; *Phelan v. Johnson*, 80–727.

But where a judgment was rendered in the supreme court, which, though it may have been erroneous, was not void, and execution

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thereon was issued to the sheriff of the county from which the case had been appealed, *held*, that injunction proceedings in the district court of such county to restrain the enforcement of such execution were improperly brought, and that the action of the judge of such court in allowing an injunction would be corrected by *certiorari: Phelan v. Johnson*, 80–727.

4636. Notice and showing for dissolution.

The rule that the refusal of the lower court to dissolve an injunction will not be disturbed unless it appears that its discretion has been abused does not apply to cases involving questions of law arising on the face of the petition itself. If it appear on the face of the pleading that as a matter of law the injunction should not have been granted, it will be dissolved: *Burlington, C. R. & N. R. Co. v. Dey*, 82–812.

4639. Punishment for violation; contempt.

The proceeding to punish a violation of an injunction is criminal in its nature, and being merely incidental to the original proceeding need not be entitled as of the original cause, but is properly brought in the name of the state as plaintiff: *Fisher v. Cass County Dist. Court*, 75–282.

The requirement that an authenticated copy of the injunction shall be furnished in a proceeding for contempt for violation thereof does not apply where the proceeding for contempt is by information filed in the court granting the injunction and not before the judge at chambers: *Silvers v. Traverse*, 82–52.

Proceedings for contempt for the violation of an injunction may be reviewed by *certiorari*, whether the defendant has or has not been punished, in all cases where a substantial right, either public or private, is involved, which can only be protected or enforced by the proceeding in contempt: *Lindsay v. Clayton District Court*, 75–509.

CHAPTER 11.

ARBITRATION.

4653. Agreement for submission.

The legality and effect of an arbitration and award not made in accordance with the provisions of the statute relating to arbitration must be determined by the rules of the common law: *Thornton v. McCormick*, 75–285.

An award will not be set aside for error in the judgment of the arbitrators, nor for a mistake which would not have had any material influence on the arbitrators in reaching their conclusions. To justify the interference of a court there must be a showing of fraud on the part of the party relying upon the award, or a material mistake which entered into it: *Ibid.*

A common-law award must be held to be conclusive between the parties as to all matters submitted to arbitration unless a material mistake appear upon the face of the award, or unless equitable grounds for setting it aside are shown. When an award is questioned on equitable grounds the pleading attacking it should allege facts, as distinguished from legal conclusions, which show that it should be set aside: *Ibid.*

Where the agreement for arbitration did not require the witness to be sworn, the fact that the arbitrators gave more credence to the unsworn statements of plaintiff than to the written evidence offered by defendant, *held* to be no ground for setting aside the award: *Ibid.*

After a party has accepted benefits given to him by an award he cannot be heard to say that it is illegal: *Ibid.*

4661. Award; how made.

An award will be set aside for material mistakes and errors prejudicial to either party, and for omission to consider matters submitted: *Adams v. New York Bowery F. Ins. Co.*, 51 N. W. R., 1149.

In a particular case, *held*, that the award of arbitrators was sufficiently supported by their findings, and that the fact that they embodied in their award decisions and recommendations entirely foreign to the questions submitted to them would not avoid the arbitration: *Lynch v. Nugent*, 80–422.

4663. Rejection; rehearing.

Where three arbitrators were appointed under an agreement that the award of a majority of them should be binding, and one of them refused to act, *held*, that the award of the other two should have been set aside, the claim that the arbitrator not acting had refused to act by reason of the procurement or at the instance of the adverse party not being established: *Kent v. French*, 76–187.

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CHAPTER 12.

ACTIONS AGAINST BOATS OR RAFTS.

4681. Against boats.

One who renders service on a boat does not have a lien therefor until seizure of the boat under a warrant, and does not have priority over a chattel mortgage: *Seippel v. Blake*, 52 N. W. R., 476.

4694. Against rafts.

This provision as to rafts is different from that found in § 4681 as to boats: *Seippel v. Blake*, 52 N. W. R., 476.

CHAPTER 13.

HABEAS CORPUS.

4730. Method of trial.

It is doubtful whether on appeal from an order refusing to release a party imprisoned for non-payment of fine such party is entitled to release on bail: *Elsner v. Shrigley*, 80–30.

4732. Action of grand jury; result of trial.

Failure of the court to specify the length of imprisonment for non-payment of fine will not entitle the defendant to release on *habeas corpus*. Such error may be corrected on appeal, but does not render the judgment void: *Elsner v. Shrigley*, 80–30.

Section applied: *State v. Zimmerman*, 49 N. W. R., 71.

CHAPTER 14.

CONTEMPTS.

4742. How punished.

The proceeding to punish a contempt of the process of a court is criminal in its nature, and being merely incidental to the original proceeding need not be entitled as of the original cause, but is properly brought in the name of the state as plaintiff; and upon the appearance of the county attorney in behalf of the state, the court has full jurisdiction to proceed with the complaint: *Fisher v. Cass County Dist. Court*, 75–232.

4744. When affidavit necessary.

Where information is filed before a court for the violation of an injunction granted by the same court, the information under oath constitutes a sufficient compliance with this section: *Silvers v. Traverse*, 82–52.

4746. Testimony reduced to writing.

Where the evidence on which an order of commitment is made is taken down in short-hand, but the notes are not filed nor certified by the judge, nor is any transcript of them filed in the case for the purpose of making it a part of the record, the commitment will be erroneous: *Dorgan v. Granger*, 76–156.

Where the short-hand minutes of the testimony were left upon the clerk's desk upon the same day upon which the order punishing for contempt was made and about two hours later, *held*, that as this constituted a filing, and as the law does not recognize parts of a day, the filing of the notes and the rendering of the judgment would be regarded as parts of one transaction: *Small v. Wakefield*, 51 N. W. R., 85.

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4748. Certiorari.

Proceedings for contempt may be reviewed by *certiorari*, whether the defendant has or has not been punished, in all cases where a substantial right, either public or private, is involved, which can only be protected or enforced by the proceeding in contempt: *Lindsay v. Clayton Dist. Court*, 75–509.

Therefore, where the district court refused to punish for a violation of an injunction restraining a liquor nuisance on the ground that the defendant had taken an appeal and filed a *supersedeas* bond, *held*, that the proceeding could be reviewed by *certiorari: Ibid.*

The action of the court in refusing to punish the defendant for contempt in violating an injunction against the illegal sale of intoxicating liquors is reviewable only by *certiorari* and not on appeal. Appeal does not lie from an order either providing or refusing to provide for punishment for contempt: *Currier v. Mueller*, 79–316.

A writ of *certiorari* to review the action of the district court in punishing for contempt can only be issued by the supreme court or a judge thereof, and the judge of the district court cannot admit the defendant to bail pending such proceeding: *State v. District Court*, 50 N. W. R., 677.

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TITLE XXI.

JUSTICES OF THE PEACE AND THEIR COURTS.

CHAPTER 1.

JUSTICES OF THE PEACE AND THEIR COURTS.

4757. Amount in controversy.

The amount in controversy is determined by the amount claimed and not by the allegation of the sum actually due: *McVey v. Johnson*, 75-165.

In an action in justice's court in which plaintiff claimed $40, and a verdict was rendered for that amount, and plaintiff immediately remitted all but $24.99 and judgment was entered for that amount, but before judgment was entered defendant filed an appeal bond, *held*, that the appeal would not lie: *Schultz v. Chicago, R. I. & P. R. Co.*, 75-240.

4760. To recover personal property; attachment.

This section, as to place of bringing suit, applies to actions in attachments, and is not in conflict with §§ 4756 and 4758, which apply to actions commenced by personal service of notice: *Anderson v. Union Pac. R. Co.*, 77-445.

4765. Parties; proceedings.

A party objecting to a decision or ruling in a justice's court must make his objection known at the time in order to have the decision reviewed upon appeal: *Condray v. Stifel*, 77-288.

4771. Service and return.

Where notice in an attachment proceeding required the defendant to appear before the justice on a certain date, and on that date the office of the justice before whom the defendant was required to appear was vacant, *held*, that a judgment rendered in pursuance of such notice should be held invalid on appeal: *Evans v. Richards*, 52 N. W. R., 541.

4801. Judgment.

Where more than ninety days elapsed after the return of the verdict before judgment was entered, *held*, that the entry of the judgment was without jurisdiction and was void, and that not having had knowledge of the erroneous rendition of the judgment within time to prosecute a proceeding by *certiorari* for the correction thereof, defendant was entitled to have the judgment set aside in equity: *Tomlinson v. Litze*, 82-32.

Where continuance was granted on agreement with a person who was claimed to be agent for a party to the suit, *held*, that it would be presumed that the act of the justice in granting the continuance was not erroneous, and that a judgment rendered in pursuance of such continuance was valid. The justice having jurisdiction, his action would be conclusive until reversed: *Iowa U. Tel. Co. v. Boylan*, 48 N. W. R., 730.

4816. Filing transcripts; lien of judgment.

A judgment in a justice's court for fine and costs for illegal sale of liquors does not become a lien as provided by § 2419, until certified and filed as here required: *State v. McCulloch*, 77-450.

A judgment rendered in a justice's court, a transcript of which is filed in the district court, becomes a lien for ten years from the filing of the transcript, and may be enforced by execution issued within twenty years from that date: *Rand v. Garner*, 75-311; *Stover v. Elliott*, 80-329.

4824. Appeals; when allowed.

Where the question to be determined was as to the discharge of attached property on the ground that the same was exempt, the hearing being on affidavits and oral evidence, *held*, that an appeal, and not a writ of error, was the method for review: *Lease v. Franklin*, 51 N. W. R., 21.

The only provision made for the transfer of a cause from a justice court to the district court is by appeal after a final judgment, and a transfer by consent of parties will not give the court jurisdiction: *Evans v. Phelps*, 77-526.

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4841. Costs of appeal.

Where trial was had in a justice's court on a claim by plaintiff and counter-claim by defendant exceeding plaintiff's claim, and judgment was rendered for defendant, and plaintiff thereupon appealed to the district court, where judgment was again rendered for the defendant, *held*, that not having pursued the method pointed out by the next section plaintiff was not entitled to have costs taxed in his favor in the district court: *Cohen v. Gibson*, 78-214.

4846. Writs of error; when allowed.

A decision involving the determination of a question of fact cannot be reviewed on writ of error: *Lease v. Franklin*, 51 N. W. R., 21.

4858. Notice in replevin or attachment against absentees.

These sections refer to actions by attachment in justice courts and are not in conflict with § 4760: *Anderson v. Union Pac. R. Co.*, 77-445.

Where notice in a proceeding by attachment required appearance on the day fixed, and on that day there was a vacancy in the office of the justice of the peace before which the defendant was to appear, *held*, that no judgment could properly be rendered in pursuance of such notice, and that in a direct attack a judgment thus rendered was void: *Evans v. Richards*, 52 N. W. R., 541.

4860. Action for forcible entry or detainer.

An assault and battery is not justifiable when made for the purpose of taking possession of a house of which another is already in peaceful possession: *State v. McKinley*, 82-445.

The owner is liable for trespass in forcibly entering upon the possession of one in possession, without regard to the title of the person thus in possession: *Kimball v. Shoemaker*, 82-459.

Where it was claimed that the defendant entered into possession by force or fraud or stealth, it is competent for defendant to show that he has been in possession for a term of years and that he has a lease from the party seeking to recover possession. Proof of such lease does not raise the question of title, such as to deprive the justice of jurisdiction: *Peddicord v. Kile*, 49 N. W. R., 997.

4863. Notice to quit.

The three days' notice required in order to authorize an action of forcible entry and detainer against a tenant holding over after the termination of his lease may be given before the expiration of the term and more than three days before bringing action; and where such notice had been given thirty days prior to the expiration of the lease and suit was brought the day after it expired, *held*, that the notice was sufficient: *McLain v. Calkins*, 77-468.

The three days' notice required to authorize an action of forcible entry and detainer against a tenant holding over after the expiration of his lease may be given before the expiration of the term: *Drain v. Jacks*, 77-629.

4869. Title not investigated.

Where defendant continued in possession of land after the expiration of a lease, claiming that plaintiff had contracted to sell it to him, *held*, that this did not raise an issue as to title, and was a proper defense: *Hall v. Jackson*, 77-201.

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TITLE XXII.

EVIDENCE.

CHAPTER 1.

GENERAL PRINCIPLES OF EVIDENCE.

4886. Who competent witness; defendant in criminal case.

The capacity of a witness twelve years of age to testify *held* sufficiently shown in a particular case: *State v. Severson*, 78-653.

As to comment of prosecuting attorney in regard to defendant not being a witness in a criminal case, see notes to § 5874.

4887. Credibility of witness.

It is always permissible to show the interest of a witness in the event of the suit in order that due weight may be given to his testimony. Therefore, where an attorney was called as a witness, it was held proper to ask him if his compensation as an attorney depended upon a recovery in the case: *Harrington v. Hamburg*, 52 N. W. R., 201.

4889. When one party is deceased.

In an action by a personal representative involving the title to land, where defendant and his wife testified that by an oral contract with the deceased they had purchased and paid for the land, *held*, that such evidence was incompetent: *Cochrane v. Breckenridge*, 75-213.

This section does not apply in a proceeding to establish a claim against an estate by one who, though an heir of the deceased, does not claim as heir but as creditor: *Harrow v. Brown*, 76-179.

In an action by an administrator against a surety on a note, *held*, that the wife of defendant was a competent witness as to transactions between the deceased and her husband: *Auchampaugh v. Schmidt*, 77-13.

Where a married woman is in possession of and claims real property under an alleged oral contract with one who is deceased, in an action to subject the property to the payment of a judgment against an heir of the deceased, the evidence of herself and husband is competent to prove the oral contract, the judgment creditor not being one of the persons designated by this section: *Drake v. Painter*, 77-731.

The word "survivor" is usually applied to the longest lived of two or more partners or trustees, and has been applied in some cases to the longest lived of joint tenants, legatees, and others having a joint interest in anything. But it has no application to persons related as principal and agent, and this section does not preclude the testimony of a party with reference to a transaction had with an insurance agent since deceased, in an action brought upon a policy of insurance procured through such agent: *Reynolds v. Iowa & Neb. Ins. Co.*, 80-563.

Where the plaintiff sought to recover from the husband items of family expense under a contract made with the wife, since deceased, *held*, that the plaintiff could not testify with reference to such contract: *Gavin v. Bischoff*, 80-605.

The testimony of a witness in an action against an executor that a certain instrument was in the handwriting of the deceased, such testimony being based on the general knowledge of the handwriting of deceased, *held* not to pertain to a personal transaction, within the provisions of this section: *Sankey v. Cook*, 82-125.

The statute does not exclude the proof of facts from which by inference other facts may be found: *McElhenney v. Hendricks*, 82-657.

In an action by an executor to recover property given by decedent to a son during his life-time, it being claimed that such transfer was produced by undue influence, *held*, that the wife of decedent was not competent to testify with reference to the transaction, but that other sons having no interest in the suit were competent witnesses: *Muir v. Miller*, 82-700.

Evidence of personal transactions with an agent since deceased is not competent in an action against his principal: *Bellows v. Litchfield*, 48 N. W. R., 1062.

A witness may, notwithstanding the provisions of this section, testify as to matters, knowledge of which is acquired without connection with the deceased person, such, for instance, as letters between the deceased and a party to the suit: *Gable v. Hainer*, 49 N. W R., 1024.

One who is an executor *de son tort* is not entitled to the protection of this section, as applicable to executors or administrators: *French v. French*, 51 N. W. R., 145.

While the widow, in case the deceased has

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not made a will or in case she has not accepted the benefit of the will, is not a legatee or heir of her deceased husband, she is next of kin, within the meaning of this section: *Ibid.*

It is not sufficient that the witness be an interested party, but his testimony must be in regard to a personal transaction or communication between him and deceased, in order to bring the case within this section: *Farmers', etc., Bank v. Creveling*, 51 N. W. R., 178.

Where suit was brought against one of three partners on a partnership debt, *held*, that one of the other partners, though not a party to the suit, was so far interested in the result of the action that he was incompetent to testify to a personal transaction between himself and the deceased partner: *Giesecke, etc., Mfg. Co. v. Seevers*, 52 N. W. R., 555.

In a particular case, *held*, that this section was not applicable: *Cahalan v. Cahalan*, 82–416.

4891. Husband and wife.

In a particular case, *held*, that the wife in her testimony had so far waived objection to her husband's testifying that he was properly permitted to do so as against her: *Estey v. Fuller Implement Co.*, 82–678.

4893. Professional confidence.

The fact that the patient, as a witness, gives testimony as to his health at a particular time, and states that the physician was attending him at that time, does not amount to a waiver of the privilege with reference to such testimony: *McConnell v. Osage*, 80–293.

It is error in such cases to ask the patient on cross-examination whether he is willing that the physician should disclose conversations with the patient as to the state of the patient's health at a time with reference to which the patient gives testimony. A fair trial requires that such matters should not be referred to. A jury should not be impressed with the belief that there is reluctance to give such assent: *Ibid.*

An attorney who was employed to draw a conveyance and whose services were subsequently sought with reference to keeping alive a mortgage on the same property, but who refused such employment, *held* not incompetent to testify with reference to communications made to him by the person for whom he rendered such service: *Theisen v. Dayton*, 82–74.

4897. Criminating questions.

It is the duty of the court to determine whether a witness should answer a question propounded, but, if reasonable grounds for believing that the answer would tend to render him criminally liable exist, it should not be required: *Mahanke v. Cleland*, 76–401.

But the witness should not be permitted to defeat the ends of justice by claiming a privilege to which there is no reasonable grounds for believing him entitled. And where the court directed the question to be answered, and there was nothing in the record as submitted to the supreme court on *certiorari* to overcome the presumption that the transaction did not involve criminal liability on the part of the witness, *held*, that the action of the trial court would not be set aside: *Ibid.*

The witness cannot claim his privilege where a prosecution for the offense of which he is guilty and to which the question relates is barred by the statute: *Ibid.*

Where the question asked of the witness related to an alleged fraudulent conveyance of property, and it appeared that a criminal prosecution for such act was barred, *held*, that the witness was not excluded from answering on the ground that such answer might expose him to public ignominy: *Ibid.*

Where a person charged with a crime testified before a coroner's jury, *held*, that such witness might subsequently, when called as a witness by another defendant charged with such crime, be asked on cross-examination as to her testimony before the coroner's jury. By once testifying freely, with knowledge that she had a right to decline to answer, she waived the privilege of not answering criminating questions and could be cross-examined for purposes of impeachment: *State v. Peffers*, 80–580.

4899. Moral character; impeachment.

It is competent to ask a witness what is his occupation and where he resides, although the answers to such questions may have a tendency to disgrace the witness, affect his credibility, or weaken his evidence: *State v. Pugsley*, 75–743.

Testimony as to the reputation of the witness should be confined to the place of his residence at the time of the trial, unless his residence there has been so brief that sufficient time had not elapsed for a reputation to have been acquired: *State v. Potts*, 78–656.

A witness may be said to be impeached when his general moral character is shown to be bad, but it is error to instruct the jury that under such circumstances they may discredit the testimony of such witness in all points in which they find it is not corroborated. Especially where the reputation as to bad moral character is founded upon indulgence in a single vice, as, for instance, sexual immorality, it does not follow necessarily that his testimony should be discredited where not corroborated. It is for the jury to say what, if any, credit should be given to the uncorroborated testimony of such witness, and they should not discredit it unless they believe its credibility has been destroyed: *McMurrin v. Rigby*, 80–322.

It is error to instruct the jury that testimony

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of a witness who is shown to have a bad reputation for truth and veracity, or whose general reputation as to moral character is bad, should be entirely disregarded, except where such testimony is corroborated by other credible evidence: *State v. Larson*, 52 N. W. R., 539.

Evidence in a particular case as to the reputation of a witness, *held* proper to be considered by way of impeachment: *State v. Farrell*, 82–553.

4902. Understanding of parties.

Where a person subscribing for stock in a corporation had the privilege of paying therefor in lumber and believed that the opposite party who subsequently made a purchase of lumber expected to pay therefor by the issuance of stock, *held*, that the person selling the lumber was bound by the understanding of the opposite party and could not insist that he had an election to pay for the stock in money and require the payment for his lumber to be made in money: *Chicago Lumber Co. v. Tibbles Manuf'g Co.*, 80–869.

This section is equally applicable to verbal and to written agreements: *Cobb v. McElroy*, 79–603.

4903. Historical and scientific works.

The Carlisle Life Tables, as found in the Encyclopedia Britannica, are admissible in evidence to show what was the expectation of life of the person for whose death damages are sought to be recovered: *Worden v. Humeston & S. R. Co.*, 76–310.

Johnson's Encyclopedia, containing life tables, *held* admissible in evidence as a standard and well known work treating on science and art: *Gorman v. Minneapolis & St. L. R. Co.*, 78–509; *Scagel v. Chicago, M. & St. P. R. Co.*, 49 N. W. R., 990.

4905. Handwriting.

This section does not require that the comparison to be made by experts shall be by juxtaposition, and in case the instrument the genuineness of which it is sought to prove has been lost, one who was familiar with it and remembers the signature may testify as to a comparison of such signature as he remembers it with a signature shown to be genuine to determine whether the two were by the same person: *Hammond v. Wolf*, 78–227.

Testimony of experts in regard to the genuineness of writings has not been considered as a rule to be of a satisfactory character; but it is admissible for what it is worth: *Ibid.*

Before a writing can be used for the purpose of making a comparison with the writing in question, the genuineness of the standard of writing must be established, and no longer a question of fact in the case. The testimony of a witness that the writing sought to be used as a standard is the writing of the person whose signature is in question is not sufficient, where the witness' testimony is based on his general knowledge of the handwriting of such person: *Sankey v. Cook*, 82–125.

Refusal of the court to permit a witness to whom a number of cards bearing the name of the person the genuineness of whose signature was in question to state whether the signatures on the cards appeared more like his genuine signature than the one in question, *held* not erroneous, it not appearing that any of the signatures on the cards were genuine: *Bruner v. Wade*, 51 N. W. R., 251.

4908. Books of account; when admissible.

In an action against a principal by his agent where certain books of account were offered in evidence, which were admitted to be books of original entries kept in the ordinary manner and in the regular course of business, *held*, that they were competent evidence against defendant, although some of the entries were made by plaintiff for defendant: *Cormac v. Western White Bronze Co.*, 77–32.

A statement of account attached as an exhibit to a petition, not showing whose book account such exhibit is a copy of, nor by whom it was kept, nor when the entries were made therein, nor that they were believed to be true, *held* not to constitute evidence: *Pidcock v. Vorhies*, 42 N. W. R., 646. (On rehearing, 49 N. W. R., 1038.)

The preliminary proof to entitle a book of accounts to be admitted in evidence, *held* not sufficiently made in a particular case: *Security Co. v. Graybeal*, 52 N. W. R., 497.

And *held*, that a book kept by a loan company, showing its loans, was not an account book within the meaning of this statute, but simply a private memorandum book, and therefore not admissible in evidence: *Ibid.*

4910. Record of instrument affecting real estate.

In a particular case, *held*, that the showing of inability of a party to produce deeds not in his possession was sufficient to entitle him to produce in evidence the record of such deeds: *Kreuger v. Walker*, 80–783.

4915. Statute of frauds; what contracts affected.

Sale of personalty; part performance: Under a contract to furnish a dealer with a certain brand of cigars as ordered, *held*, that the filling of certain orders constituted a part performance taking the contract out of the statute of frauds, and that each order was not to be considered a separate transaction: *Kaufman v. Farley Mfg. Co.*, 78–679.

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Debt of another: The statute of frauds has no application to an agreement between one insurance company and another, by which the lattter assumes the liabilities of the former, and such agreement may be established by parol evidence: *Bartlett v. Fireman's Fund Ins. Co.*, 77–155.

Where it is sought to hold one person liable on his promise to pay for goods delivered to another, if any credit at all be given to the party to whom the goods are delivered, the promise of the party sought to be charged is collateral, and must be in writing. But in a particular case, *held*, that in case of goods thus furnished, the seller did not at any time charge them to the person to whom they were furnished, although the bills of goods thus furnished were designated as bills of the seller against the person to whom the goods were furnished: *Benbow v. Soothsmith*, 76–151.

Promise by executor: If a widow appropriates the estate of her deceased husband to her own use, thereby making herself liable for the payment of just claims against the estate, her promise to pay such a claim for the purpose of preventing suit, if not coupled with any unlawful object, would be for her own benefit, and not a mere promise to pay the debt of another, and such promise, though oral, could be enforced against her: *French v. French*, 51 N. W. R., 145.

Transfer of interest in real estate: An agreement to purchase property under a foreclosure sale and acquire title thereunder, and hold the same as security for the money so advanced, until it should be repaid, when the property should then be reconveyed to the owner, is an agreement for the creation and transfer of an interest in real estate, and cannot be established by parol evidence: *Thorp v. Bradley*, 75–50.

Where plaintiff conveyed real estate in consideration of an agreement for support during her life, and the grantee afterward conveyed the land to defendant, who assumed the obligation to support plaintiff, *held*, that the transaction did not create a trust and might be proven by parol evidence: *Riddle v. Beattie*, 77–168.

A license does not convey an interest in land, being always confined to the original parties to it: *Ague v. Seitsinger*, 52 N. W. R., 228.

Parol evidence is not admissible to establish an agreement that a tax title shall be taken and held in trust for the owner of the premises: *Richardson v. Haney*, 76–101.

A parol gift of lands by a father to his son, accepted by the son, and upon the faith of which he has taken possession and made lasting improvements, is an exception to the rule requiring contracts relating to real estate to be evidenced in writing, and such gift may be enforced by specific performance: *Truman v. Truman*, 79–506.

But the parol contract, agreement or gift should be established by clear, unequivocal and definite testimony, and acts claimed to have been done thereunder should be equally clear and definite and referable exclusively to the said contract or gift: *Ibid.*

A parol agreement that the plaintiff should have a certain tract of land in consideration for services rendered by him to defendant, his father, in carrying on defendant's farm in pursuance of a contract to that effect, *held* sufficient, in connection with the possession of the premises, to constitute adverse possession, ripening into perfect title by lapse of time: *Quinn v. Quinn*, 76–565.

Where it is sought to enforce specific performance of a parol gift of land upon the ground that the agreement has been partially executed and that improvements have been made on the faith of such parol gift, the proof must be clear and unequivocal: *Lich v. Lich*, 81–84.

As to written evidence of contracts with reference to party-walls, see notes to § 3205.

Not to be performed within one year: Where a contract to marry provided that the marriage should not take place until the restoration to health of one of the parties, but it did not appear that it was not to be performed within one year, *held*, that it was not within the statute of frauds: *McConahey v. Griffey*, 82–564.

4916. Exceptions.

The provision of this section referring to the fourth subdivision of the preceding section relates solely to contracts for the purchase or sale of real estate, and does not have the effect to qualify the rule enacted by the preceding section as to leases for a term exceeding one year: *Thorp v. Bradley*, 75–50.

Part performance of an oral lease within the statute of frauds is not sufficient to take it out of the statute: *Burden v. Knight*, 82–584.

An agreement to give a mortgage on real estate for the purchase-money, though not in writing, does not come within the statute of frauds, when part of the purchase price has been paid, and the vendee, with the consent of the vendor, has taken possession of the property: *Devin v. Eagleson*, 79–269.

Parol evidence of a verbal agreement of sale and a payment of a part of the consideration is competent: *Pressley v. Roe*, 50 N. W. R., 44.

Where an oral contract was made in regard to a partition fence, *held* that, by adopting and acknowledging the benefit of the fence already erected, the contract was performed in such sense as to take it out of the statute of frauds: *Bodell v. Nehls*, 52 N. W. R., 123.

Where an easement had been taken possession of and used for many years, *held*, that there was sufficient part performance to take the parol grant of such easement out of the statute of frauds: *Ague v. Seitsinger*, 52 N. W. R., 228.

A special agreement in regard to a party-wall is not a contract for the creation or transfer of any right or interest in the land for the reason that there is a right to erect a wall on the line without an agreement, and therefore such contract will not, under § 3205, be helped by part performance: *Price v. Lien*, 51 N. W. R., 52.

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4918. Contract proved by evidence of party to be held.

A party claiming under a contract within the statute of frauds should aver facts necessary to take it out of the statute, or the pleading will be vulnerable to demurrer. It cannot be assumed that the demurrer is an admission by the defendant of the contract: *Burden v. Knight*, 82–584.

4920. Presumption in behalf of officers and inferior courts.

Where it appeared that an ordinance had been published in a newspaper, *held*, that the presumption that the officers had done their duty was sufficient to show that the newspaper was one of general circulation in the corporation, as required by law: *Bayard v. Baker*, 76–220.

Where it appears that a justice has jurisdiction in the case, all subsequent proceedings therein will be presumed regular and conclusive until reversed: *Iowa U. Tel. Co. v. Boylan*, 48 N. W. R., 780.

The acts of a court of competent jurisdiction are presumed to have been rightly done until the contrary appears: *American Emigrant Co. v. Fuller*, 50 N. W. R., 48.

4923. Subpœna duces tecum.

The provisions of this and the following sections are applicable to a witness, but not to a defendant whom it is sought to compel to produce books and papers as contemplated in §§ 4936–4938: *Beebe v. Equitable Mut. L., etc., Ass'n*, 76–129.

4936. Production of books and papers.

Under these sections the application must be by petition stating the facts expected to be proved by the books or papers and that they are under the control of the party against whom the rule is sought, and it is not proper to grant the rule on defendant to produce such documents where their production is sought to be procured by notice on defendant instead of by petition: *Beebe v. Equitable Mut. L., etc., Ass'n*, 76–129.

Where a motion was filed on the morning of the day set for trial for an order requiring plaintiff to produce his books of account for the purpose of being inspected and copied, and it appeared that plaintiff resided and did business in Chicago and that the issues were settled and the case set for hearing six months before the motion, *held*, that the motion was properly overruled, as the order might have been refused because of the delay in asking for it: *Schmidt v. Kiser*, 75–457.

A party who is called upon to produce his books is not entitled to have taxed as costs in his favor the expense of having a statement made showing the condition of accounts as appearing in such books: *McNider v. Sinine*, 51 N. W. R., 170.

4940. Affidavits.

Affidavits are recognized as competent evidence on the hearing of applications for a temporary injunction and for other purposes, and by agreement they are frequently treated as competent evidence on a final hearing of the case. There can be no objection to their being used when all the parties in interest assent to it: *Geyer v. Douglass*, 52 N. W. R., 111.

4953. Copies of records and entries.

The assignment of a mortgage on real estate is an instrument authorized to be recorded, under § 3112, and a copy of such record is therefore admissible: *Kenosha Stove Co. v. Shedd*, 82–540.

4963. Judicial records.

The record of a judgment of a court of general jurisdiction is admissible in evidence without proof of service of process and the pleadings: *American Emigrant Co. v. Fuller*, 50 N. W. R., 48.

4969. Statutes; presumption.

The statutes of another state will, in the absence of any showing to the contrary, be presumed to be the same as those of this state: *Davis v. Chicago, R. I. & P. R. Co.*, 49 N. W. R., 77; *German Bank v. American F. Ins. Co.*, 50 N. W. R., 53; *In re Capper's Will*, 52 N. W. R., 6.

4973. Depositions; notice of taking.

Where certain depositions were taken in behalf of intervenors and notice served on an attorney of both the adverse parties to the suit, but the acceptance of service indicated that the attorney signing was attorney for one party only, *held*, that as the notice was addressed to him as attorney for both, by accepting the notice addressed to him he would be presumed to do so in that capacity, and the service of the notice was sufficient: *Walker v. Abbey*, 77–702.

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4976. Who may take depositions under commission.

Where the commission was directed "To any notary public in and for Dauphin Co., Pa.," *held*, that the abbreviations used were such as were generally understood and that the deposition was properly admitted: *Gilman v. Sheets*, 78–499.

4981. Reasonable notice.

The county referred to in this section is not the county in which the depositions are to be taken, but the county from which the commission is to issue: *Cook v. Gilchrist*, 82–277.

4982. How notice served.

In a case in which a sheriff is a party, his deputy is disqualified from acting, and service of notice to take depositions made by such deputy is illegal, and the depositions taken in pursuance of such notice should be suppressed: *Gollsbitsch v. Ranibon*, 51 N. W. R., 48.

4985. Manner of taking; commission; form of.

Where a commission was sent to the witness, who delivered it to the proper officer, *held*, that in the absence of any showing of prejudice there was not error in overruling a motion to suppress the deposition: *Phelps v. Walkey*, 50 N. W. R., 560.

4986. How taken.

The fact that the interrogatories attached to the commission are not written out by the notary and the answers of the witness written thereunder will not necessarily render the depositions invalid, where the interrogatories are numbered and the answers show by number the interrogatory to which each answer is intended to apply: *Giles v. Paxson*, 36 Fed. R., 882.

In a particular case, where in taking depositions the question was asked, "In whose care was the car-load, claimed for in this action, sent to Chicago," and the notary inadvertently wrote, "In whose car," *held*, that the mistake was not prejudicial: *Richmond v. Sundburg*, 77–255.

4987. Exhibits appended.

Where the deposition shows that the witness refers to a deed, it is proper for the notary to return a copy thereof attached to the deposition: *Giles v. Paxson*, 36 Fed. R., 882.

4988. Certificate.

Where it was stipulated that a person named should act as commissioner in lieu of a notary, and that the witnesses should be sworn by competent authority and the depositions taken by the person named, and when filed have the same force and effect as depositions taken in the ordinary way, *held*, that the objection that the depositions were not properly certified or signed would not be sustained: *Shoemake v. Smith*, 80–655.

Certificate to depositions in particular cases, *held* sufficient: *Ingram v. Wakernagel*, 48 N. W. R., 998; *Giles v. Paxson*, 36 Fed. R., 882.

4989. Neither party to be present.

The statute does not require the certificate to show the fact when neither party nor agent is present; and where the certificate is silent as to the fact and there is no evidence to the contrary, it will be presumed that the requirements of the law have been observed: *Turner v. Hardin*, 80–691.

Where it appears that the depositions were reduced to writing by another person than the notary and in his presence, it will not be presumed that such other person was the agent or attorney of the party unless that fact appears: *Cook v. Gilchrist*, 82–277.

4992. Unimportant deviations.

Section applied: *Giles v. Paxson*, 36 Fed. R., 882.

5002. Notice of filing; exceptions; introduction.

Where motion to suppress depositions was made after the second day of the term on the ground that it did not appear that neither the party nor his agent or attorney was present, *held*, that the objection was made too late: *Turner v. Hardin*, 80–691.

Where a stipulation was entered into by the parties to the effect that plaintiff might introduce and use in his own behalf a deposition in another case to which defendant was not a party, *held*, that under such stipulation defendant was not entitled to introduce in evi-

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dence such deposition: *Borland v. Chicago, M. & St. P. R. Co.*, 78–94.

Where the deposition of plaintiff was taken in his own behalf before the first trial of the case, and the parties entered into a written agreement that it might be used in evidence in the trial of the cause, but plaintiff, being present at the trial, testified orally, and at the second trial, plaintiff not being present, the deposition was read, *held*, that as the agreement did not prescribe when the deposition should be read, it was properly admitted: *Nelson v. Chicago, M. & St. P. R. Co.*, 77–405.

Where the court refused to allow the introduction, after the close of the testimony of both parties, of a deposition received by mail after the close of the evidence, *held*, that as it did not appear that in other respects the deposition was admissible, the action of the court in excluding it was not shown to be erroneous: *Gorman v. Minneapolis & St. L. R. Co.*, 78–509.

5005. Costs of depositions.

The costs to be taxed are the fees allowed by the statute in this state, and not the fees allowed according to the laws of the state where the depositions are to be taken, if taken out of the state: *MaNider v. Sinine*, 51 N. W. R., 170.

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TITLE XXIII.

COMPENSATION OF OFFICERS.

CHAPTER 1.

STATE AND DISTRICT OFFICERS.

5029. Short-hand reporters; transcript of evidence.

If the short-hand reporter's notes are properly filed and made a part of the bill of exceptions the transcript thereof may be filed at a later time, provided it is so filed in such time that the case may be properly presented to the supreme court: *Hammond v. Wolf*, 78–227.

And see notes to § 4041.

The transcript of the evidence of a witness taken by the short-hand reporter on a former trial may be introduced in evidence where the deposition of such witness would be admissible; for instance, where the witness lives in a county of the state other than that wherein the trial is held: *Bank of Monroe v. Gifford*, 79–800.

A transcript of the short-hand report of the evidence may be used on a subsequent trial of the case to impeach the testimony of witnesses whose evidence on the former trial is contained therein: *Hibbard v. Zenor*, 82–505.

Where the judge in his certificate of evidence recognizes the person taking the same as the official stenographer, his subsequent certificate that such stenographer had not been duly appointed will not affect the validity of the record of the evidence. Under such circumstances it would appear that the reporter was the *de facto* officer of the court, and that would be sufficient: *Elter v. O'Neil*, 49 N. W. R., 1013.

CHAPTER 2.

COUNTY AND TOWNSHIP OFFICERS.

5036. Compensation of clerk of district court; deputies.

See notes to § 1243.

5056. Compensation of sheriff; boarding prisoner. 19 G. A., ch. 94, § 17; 23 G. A., ch. 41. For boarding a prisoner, a compensation to be fixed by the board of supervisors, not more than fifty cents per day.

[As amended by making the minimum limit the maximum.]

5063. Compensation of sheriff in general.

Sheriffs are not entitled under this statute to fees for attending before a court with a prisoner: *Painter v. Polk County*, 81–242.

But where payments of fees had been made by the county to the sheriff prior to the decision that such charges were not lawful, *held*, that the payment was voluntary and the county was not entitled to recover back the money paid or counter-claim the same in an action by the sheriff to recover other fees: *Ibid.*

5064. Fees in criminal causes.

Under this section the costs in liquor cases, including the attorney's fee, provided for under § 2385, are to be paid by the county, where not recoverable from the defendant: *Newman v. Des Moines County*, 52 N. W. R., 105.

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5067. Compensation of county treasurer; deputy.

This section relates to the employment of a regular deputy with the authority of the board of supervisors, and is not in conflict with § 1243, which relates to the employment of temporary assistance without such authority: *Harris v. Chickasaw County*, 77–845.

Allowance of payment of other or greater compensation to a public officer than that fixed by law for his services is unauthorized and void: *Adams County v. Hunter*, 78–828.

5080. Fees of justices of the peace.

A certificate or transcript filed by the justice with the auditor for the purpose of securing an allowance of his fees by the county does not constitute a certificate or transcript for which a fee may be charged: *Hinesley v. Mahaska County*, 78–812.

The term "trial" used in this section means the judicial determination of an issue of law or fact, raised by demurrer or plea, and a justice is not entitled to the trial fee where defendant pleads guilty, and nothing remains for the justice to do but to pronounce judgment. Although in such cases he may hear testimony in mitigation or aggravation of the punishment, this will not constitute a trial: *Mathews v. Clayton County*, 79–510.

5082. Fees of justice of the peace in criminal cases.

A justice is not entitled to tax up as costs a certificate or transcript filed by him with the auditor for the purpose of securing payment by the county of his fees: *Hinesley v. Mahaska County*, 78–812.

5083. Fees of officers for seizure of intoxicating liquors.

The officer issuing or serving a search-warrant for the seizure of intoxicating liquors is entitled to have his fee therefor paid by the county, in case no liquors are found, in the same way as other costs are paid by the county in cases in which for any reason the prosecution fails: *Byram v. Polk County*, 76–75; *Garrett v. Polk County*, 78–108.

CHAPTER 8.

WITNESSES, JURORS, AND SPECIAL CASES.

5090. Fees of witnesses.

The arrest of the accused is essential to the power to subpœna a witness to testify on a preliminary examination; and where a subpœna was issued before any preliminary information was filed or arrest thereunder made, *held*, that a witness attending from another state in response to such subpœna could not recover witness fees from the county: *Warnstaff v. Louisa County*, 76–585.

5095. Fees of witnesses in criminal cases.

Where witnesses are subpœnaed upon the order of the court or magistrate before whom the cause is to be tried, upon a satisfactory showing that the testimony of the witnesses is material, the county becomes liable for their fees without an order to that effect being made at or subsequent to the trial; but the order may be made at the trial or when judgment is pronounced: *Wheelock v. Madison County*, 75–147.

Where a witness for defendant, residing in another state, attended the trial without subpœna having been issued for him, *held*, that he was not entitled to mileage, but only to fees for his attendance, and that this rule was applicable even as to a witness included in the order of court allowing witnesses to defendant: *State v. Willis*, 79–826.

5109. Fees for defending criminals or prosecuting for sale of intoxicating liquors.

This section, though by its terms it applies only to cases of information for sale of intoxicating liquors, is to be construed to cover all cases of information for violation of § 2408, including information for search-warrant and for seizure of liquors; also charging defendant with owning and keeping liquors with intent to sell: *Nichols v. Polk County*, 78–187.

5115. Fees for depositions.

Where depositions are taken out of the state, the fees to be taxed therefor are those which are allowable under this section and not such fees as the officer is entitled to in the state where the depositions are taken: *McNider v. Sinine*, 51 N. W. R., 170.

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5117. Recovery of fees.

If an officer, entitled to the remedy provided by this section, seeks to recover his fees by an ordinary action, he must bring his action within five years: *State Ins. Co. v. Griffin*, 51 N. W. R., 68.

5121. Recovery of costs from county where crime committed.

Under § 5766 the expenses of a trial where change of venue is taken are to be paid by the county in which the trial is had, being recoverable by it under this section from the county where the crime is committed: *Lockhart v. Montgomery County*, 76–79.

5122. Fees to be paid in advance; fee bill.

Where a justice, after transcript of a judgment in his court was filed in the proper court and more than ten years after the judgment was rendered caused a fee bill to be issued, and after its return unsatisfied commenced suit against the plaintiff in the action for costs, *held*, that he was not entitled to relief by reason of the lapse of time: *State Ins. Co. v. Griffin*, 51 N. W. R., 68.

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TITLE XXIV.

CRIMES AND PUNISHMENTS.

CHAPTER 2.

OFFENSES AGAINST THE LIVES AND PERSONS OF INDIVIDUALS.

5128. Murder.

It is the province of the jury to determine whether the injury inflicted by defendant upon deceased caused or contributed to the death of deceased. The fact that the deceased was afflicted with a disease which might have proved fatal would not constitute a defense to the charge of murder, nor would ignorance on the part of defendant of the diseased physical condition of deceased excuse defendant's acts: *State v. O'Brien*, 81–88.

Under the circumstances of a particular case, *held*, that it sufficiently appeared that the death of deceased was due to defendant's wrongful acts, and not solely to pre-existing disease: *Ibid.*

Where defendant, a school-boy sixteen years of age, was on trial for homicide for causing the death of a playmate by means of a twenty-two calibre pistol, *held*, that although the size of a cartridge in such a pistol is little larger than a gun cap it was not error to instruct the jury on the theory that such instrument was a deadly weapon: *State v. Sterrett*, 80–609.

"Justifiable" and "excusable" are synonyms, and it is not error in instructing the jury with reference to self-defense to speak of "justifiable self-defense:" *State v. Row*, 81–188.

In a particular case, *held*, that an instruction with reference to the amount of force to be used in resisting an unlawful arrest was correct: *Ibid.*

In a particular case, *held*, that the evidence was such as to indicate that defendant acted in self-defense and therefore the trial court was in error in not fully instructing the jury on that subject: *State v. Donahoe*, 78–486.

And *held*, that in such instructions the court should have told the jury that the burden of proof was on the prosecution to prove defendant guilty beyond a reasonable doubt instead of indicating that the burden was on defendant to show that he was excusable by reason of self-defense: *Ibid.*

Where it was claimed that defendant in committing a homicide had acted in self-defense, *held*, that the instructions of the lower court that the jury should consider the condition of defendant's health, the place where the shooting occurred, the size, age and relative strength of the parties, etc., were sufficient: *State v. Sterrett*, 80–609.

In a prosecution for murder where it appeared that the deceased was in an intoxicated condition and that he had removed his coat and vest for a fight with defendant, and that no weapon was found on his person nor near the place of the conflict, and that he had received six wounds, while there was no evidence that defendant received any injury nor suffered any violence in the fight, *held*, that defendant was not excusable on the ground of self-defense and the jury were warranted in finding a verdict of manslaughter: *State v. Shreves*, 81–615.

Instructions as to self-defense in a particular case considered: *Ibid.*

An instruction containing the expressions "enormous injury," "enormous bodily injury" and "dreadful injury," as indicating the degree of danger defendant must have apprehended before he was justified in taking life in self-defense, *held*, not erroneous, as the expressions were used as the equivalent of "great bodily harm:" *State v. Murdy*, 81–603.

An instruction to the effect that, if the defendant sought the place of business of the deceased in order to provoke a quarrel with him, he could not avail himself of the plea of self-defense, though the killing may have been necessary to preserve his own life, *held*, not erroneous, as there was evidence upon which to base such instruction: *Ibid.*

The character and reputation of deceased as a quarrelsome, vindictive and dangerous man, and threats made by him against defendant of which the dejendant charged with homicide had knowledge, may be proved where the question is whether defendant acted in self-defense: *State v. Donahoe*, 78–486.

Under the facts of a particular case, *held*, that the evidence was not sufficient to show that the death of deceased caused by a bullet from a revolver was due to defendant and was not the suicidal act of the deceased, and the conviction of the defendant was, therefore, reversed: *State v. Billings*, 81–99.

In a particular case, *held*, that the evidence fully supported a verdict of murder in the second degree: *State v. Murdy*, 81–603.

Where defendant was convicted of murder upon circumstantial evidence alone, *held*, that it was the province of the jury to determine the value and the weight of the evidence, and upon appeal the court would not be justified in saying that their verdict should be set aside because it was unsupported by the evidence: *State v. Kennedy*, 77–208.

As to what crimes are deemed included in the charge of murder, see notes to § 5851.

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5129. Murder in first degree.

An indictment for murder in the first degree, charging defendant with inflicting a wound "feloniously, deliberately, premeditatedly and with malice aforethought," but not charging, except in the concluding part of the indictment, that the murder was so committed, is not sufficient: *State v. Andrews*, 50 N. W. R., 549.

5130. Murder in second degree.

Where it appears that defendant formed the purpose of doing deceased an injury some moments before the injury was inflicted, *held*, that there was sufficient premeditation to constitute the crime of murder in the second degree: *State v. Peffers*, 80-580.

5155. Manslaughter.

An assemblage of persons for the purpose of a *charivari* accompanied with tumult and confusion is provocation to those annoyed and insulted by it, and may be sufficient to reduce a homicide committed under such provocation to manslaughter: *State v. Adams*, 78-292.

5157. Robbery.

The crime of robbery cannot be committed where there is no putting in fear and no resistance, without the use of force or violence other than that required to take and remove the property: *State v. Miller*, 49 N. W. R., 90.

5160. Rape.

It is not necessary to allege in the indictment that the act was feloniously done where the assault alleged to have been made was felonious, and the act forcible and against the will of the person injured: *State v. Casford*, 76-330.

Where evidence of non-consent is introduced, and the jury is charged that there can be no conviction unless the act was accomplished by force and against the will of the prosecutrix, it will be immaterial that the indictment states the age of the prosecutrix as being over ten years instead of over thirteen years as contemplated by the amendment to this section: *Ibid.*

Evidence as to certain stains found on clothing of prosecutrix at the time the offense was committed, *held* competent as tending to show that the crime had in fact been committed: *State v. Montgomery*, 79-737.

Evidence in a particular case, *held* not sufficient to support the verdict of guilty, the acts of the prosecutrix at the time of the alleged commission of the crime, her prior conduct, and statements made by her, not being consistent with the testimony as to the commission of the crime: *State v. Cassidy*, 52 N. W. R., 1.

Where the female injured is a witness the fact that she made complaint of the injury may be shown, but not the particulars thereof: *McMurrin v. Rigby*, 80-322.

A person to whom complaint is made may testify as to the fact of such complaint, and as to what the injured party complained of, as that the person accused ravished or had intercourse with her: *State v. Watson*, 81-380.

Where there was conflicting testimony as to the injuries received by prosecutrix, in an alleged rape, *held*, that a medical witness might testify as to an examination made by him, four weeks after the alleged injury, the weight of such evidence being for the jury: *Ibid.*

Instructions in a particular case *held* not open to the objection of limiting the inquiry of the jury to certain special facts in the case: *Ibid.*

As to corroborating evidence, see notes to § 5958.

5161. Compelling to marry; defilement.

An indictment which charged the crime of forcible defilement, and in which words were used which described the crime of rape, *held* not bad for duplicity, as the two offenses named are much alike, differing chiefly in the amount of force used, and the indictment considered as an entirety clearly showed an intent to charge forcible defilement: *State v. Montgomery*, 79-737.

In such case corroboration of the testimony of prosecutrix is not required: *Ibid.*

5166. Seduction.

An indictment charging the seduction of Mary E. Starner, being then and there an unmarried female of previous chaste character, *held* sufficient to indicate that the charge had reference to the seduction of a woman: *State v. Henm*, 82-609.

Something more than mere appeal to the lust and passion of a woman must be shown before the law will afford her a remedy by way of damages: *Hawn v. Banghart*, 76-683.

But under the facts in a particular case, *held*, that there was evidence that defendant, a married man, had, by caresses and flatteries, acquired such influence over plaintiff, a girl of fifteen, that by means of her affection for him he had been able to accomplish his purpose, and that therefore the verdict for plaintiff would not be set aside: *Ibid.*

As affecting the damages in such case, it is not proper to show how particular acquaintances had treated plaintiff after the injury done to her by defendant in proving loss of social standing, but it will be taken notice of by the jury without proof: *Ibid.*

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Where improper relations between defendant and prosecutrix had existed, but were discontinued for some months and were then resumed, and there was evidence that they were resumed on promises of marriage by the defendant, and there was evidence that prosecutrix had not had improper relations with any one but defendant, *held*, that the jury were warranted in finding that at the time of the resumption of such relations prosecutrix was of chaste character: *State v. Moore*, 78–494; *State v. Gnagy*, 50 N. W. R., 882.

Evidence as to chaste character must be strictly confined to the time immediately prior to the alleged seduction: *State v. Gnagy*, 50 N. W. R., 882.

In a prosecution for seduction, upon an issue as to the previous chastity of the prosecutrix, where defendant introduced testimony tending to show improper conduct and associations on her part, *held* not sufficient to overcome the presumption of chaste character, to which was added the testimony of neighbors and acquaintances that her previous character for chastity was good: *State v. Bell*, 79–117.

An instruction in a particular case *held* to sufficiently express the thought that proof of sexual intercourse is not essential to establish unchastity: *State v. Standley*, 76–215.

Where defendant introduces evidence of want of chastity on the part of prosecutrix, it is not proper to say that the burden of proof shifts upon the issue of chastity. The burden is on the defendant to show want of it: *State v. Hemm*, 82–609.

In such case it is not necessary to instruct the jury that if on all of the evidence, including the evidence as to want of chastity, there is a reasonable doubt as to whether the defendant is guilty, he should be acquitted. It is is proper to instruct that, if it has not been shown by a preponderance of the evidence that prosecutrix was unchaste in character, the jury should find that she was chaste: *Ibid.*

Evidence of language of prosecutrix three years before the alleged seduction and when fourteen years of age, *held* not admissible to show want of chastity: *Ibid.*

Acts and declarations of defendant touching his relations with prosecutrix from the time of their first acquaintance down to the trial may be shown. Acts subsequent to the alleged seduction are to be considered in determining whether a criminal intent existed at the first act, and whether the defendant was acting in good faith: *State v. Mackey*, 82–393.

It is not error to allow the prosecutrix to testify that after the alleged seduction she gave birth to a child, and to state the date of such birth, and to testify that a child with her is such child: *State v. Clemons*, 78–123.

Also *held*, that the person with whom prosecutrix lived at the time of the alleged seduction should have been permitted to testify that before the alleged seduction prosecutrix was out often late at night: *Ibid.*

It is error to instruct the jury that nothing said or spoken by the prosecutrix after the seduction can be shown as indicating want of chastity. Declarations or admissions made after seduction as to prior practices would be admissible for that purpose: *Ibid.*

In a prosecution for seduction, letters written by defendant to prosecutrix *held* properly admitted in evidence, where the contents of such letters were material as tending to show the relation of the parties, and even though a question was raised as to whether they were all in the same handwriting: *State v. Bell*, 79–117.

In a prosecution for seduction, where prosecutrix was permitted to testify that she understood that the defendant had other living children, *held*, that the evidence was improperly admitted, as it did not tend to prove the crime charged, and was prejudicial to defendant: *State v. Thompson*, 79–703.

And also *held*, that it was error to permit the prosecutrix to testify that defendant had written to her charging others with being the father of her child, as such evidence was secondary and also prejudicial: *Ibid.*

As to corroboration of testimony of prosecutrix in prosecutions for seduction, see notes to § 5958.

5167. Marriage a bar.

The mere willingness of the defendant to marry the woman is no bar to a prosecution for seduction, but the fact may be shown upon the question as to whether the woman was really seduced, or may be considered by the court in mitigation of punishment: *State v. Thompson*, 79–703.

The offer of defendant to marry prosecutrix is not a bar to the indictment. Nothing less than actual marriage will constitute such bar, and it is not proper to require the prosecution to prove beyond a reasonable doubt that the defendant refused to marry the prosecuting witness: *State v. Mackey*, 82–393.

5170. Malicious threats to extort.

The act of an officer in negotiating for a bribe for an omission to discharge his official duty does not constitute a crime under this section: *State v. Pierce*, 76–189.

It is essential that the threats be made to or in the presence of the person against whom they are directed: *State v. Brownlee*, 51 N. W. R., 25.

Therefore, where defendant communicated to another his purpose to extort money from the prosecutor by threats, and made arrangements to meet the prosecutor for that purpose, but no threats to the prosecutor were ever made, *held*, that the crime was not committed, although the person to whom the plan was communicated advised the prosecutor of what was intended, and made arrangements to entrap the defendant: *Ibid.*

5171. Assault with intent to murder.

In determining the intention with which the assault was made, the character and locality of the wound may be taken into account, and the nature of the weapon: *State v. Woodard*, 50 N. W. R., 885.

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5172. Assault with intent to commit rape.

A female under the age of thirteen years (as specified in § 5160) is not competent to consent to an assault with intent to have sexual intercourse: *State v. Grossheim*, 79–75.

An instruction to the effect that the law would presume the criminal intent from certain acts specified, *held* not erroneous, as sexual intercourse would be the natural result of such acts and the defendant must be presumed to have intended such result in the absence of evidence to show the presumption not well grounded: *Ibid.*

Where there was no question that an assault to commit rape had been made, *held*, that the evidence was sufficient to justify the jury in finding a verdict against defendant: *State v. Hatfield*, 75–592.

The corroborating evidence required by § 5958, in prosecutions for rape, is not required in cases of assault with intent to commit rape: *Ibid.; State v. Grossheim*, 79–75.

5175. Assault with intent to commit any felony.

Where, if death had resulted from the assault, the crime would have been manslaughter, the assailant is guilty of assault with intent to commit manslaughter: *State v. Postal*, 50 N. W. R., 207.

5177. Assault and battery.

The definition of an assault as "an attempt or offer by force and violence to do a corporal injury to another," *held* erroneous, as the attempt to do the injury to the person of another by violence might under some circumstances be lawful; but in a particular case *held* that, the evidence not being before the supreme court, it would not be presumed that there was anything tending to show such state of facts as would render the act lawful: *State v. Wyatt*, 76–328.

The act of defendant in shaking his fist at the prosecutor and turning about the horse on which the prosecutor was riding, *held* not to constitute an assault in view of the fact that defendant was protesting against and attempting to prevent prosecutor from riding across defendant's land on the line of a highway not yet opened: *State v. Stoke*, 80–68.

An assault and battery is not justifiable when made for the purpose of taking possession of a house of which another is already in peaceful possession: *State v. McKinley*, 82–445.

Where defendant in pursuance of an unlawful purpose broke into the house of prosecutor and assaulted him, *held*, that the fact that defendant believed prosecutor was going into the house for a gun to use as against defendant would not constitute a defense, if it appeared that defendant could have escaped from the peril, if any, by going away: *Ibid.*

CHAPTER 3.

OFFENSES AGAINST PROPERTY.

5179. Burning inhabited dwelling in night time.

There can be no conviction without satisfactory proof that the building was wilfully, maliciously and felonicusly burned by some one and that such burning was not accidental: *State v. Carroll*, 51 N. W. R., 1159.

5184. Setting fire with intent to burn.

Where an indictment charged the setting of fire to material with intent to burn a building and also alleged the burning of the building, *held*, that the latter allegation was not a charge of a distinct crime under the preceding section, but was a statement of facts showing the intent, and the indictment did not therefore charge two offenses: *State v. Hull*, 48 N. W. R., 917.

5189. Allowing fire to escape.

This section renders a person setting out fire and allowing it to escape within the prohibited period absolutely liable for the consequences, irrespective of the degree of diligence used to prevent its escape after being set out by him: *Thoburn v. Campbell*, 80–338.

If in such a case the fact that defendant set out the fire to protect his own property constitutes a defense, it is one which must be specially pleaded: *Ibid.*

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5190. Burglary.

Breaking and entry of a dwelling-house in the night time with intent to commit adultery is burglary: *State v. Corliss*, 51 N. W. R., 1154.

One who breaks into the dwelling-house of another in the night time, in the absence of any explanation of the act, will be presumed to have intended to commit a public offense: *State v. Fox*, 80–312.

An indictment for burglary which describes the premises as a "dwelling-house belonging to," etc., sufficiently describes the ownership thereof: *Ibid.*

The fact that the indictment charges two different intents does not render it bad. The crime may be established by the proof of one or all the intents alleged: *Ibid.*

Where defendant was charged with breaking and entering buildings and stealing property therefrom and two indictments were found for each act, *held*, that they were separate offenses and separate indictments might be returned for each: *State v. Turney*, 77–269.

It is not necessary in charging burglary by breaking and entering with intent to commit larceny to state the character of the property intended to be stolen, nor its value or ownership: *State v. Jennings*, 79–513.

The jury may, from the fact of recent possession of property stolen in connection with the commission of burglary, find the fact of breaking, from the fact of possession, having in view the facts and surroundings thereof, but it is not required so to do. No definite presumption follows the possession as a matter of law, and the burden is not necessarily shifted to explain such possession: *Ibid.*

5194. Other breakings and enterings.

The word "break" used by the statute does not imply the use of any degree of force or violence in order to injure or destroy any part of the building but the force that is necessary to remove the impediments to entering, as the opening of doors. Therefore *held*, that the lifting of the latch of a door and entering a store-room in the day-time with the purpose to steal, the store being at the time occupied by and in the possession of the owner, constituted a sufficient breaking: *State v. O'Brien*, 81–93.

5203. Jumping from cars in motion.

Where a person wrongfully jumps from a train in motion in violation of this section, the law will presume that any injury sustained by such act is the result of his own negligence: *Herman v. Chicago, M. & St. P. R. Co.*, 79–161.

CHAPTER 4.

LARCENY AND RECEIVING STOLEN GOODS.

5208. Larceny.

Where the owner of goods parts with their possession without the purpose of parting with the property therein, and expects their return or disposition according to his direction, or expects payment for them to complete the sale thereof, the taking and conversion of them, with the felonious intent to deprive the owner thereof, is larceny. So, if possession is gained by a trick, artifice, or false representation, with the intent on the part of the accused to convert them to his own use, he is guilty of larceny: *State v. Hall*, 76–85.

Therefore, where defendant having procured a tailor to furnish materials for and make for him a suit of clothes induced the tailor's employee to deliver the garments to him and go with him to his room to receive payment and then escaped with the clothes, *held*, that he was guilty of larceny: *Ibid.*

In a prosecution for larceny of certain flax-seed, defendant claimed that it was taken under an understanding that he was authorized to take such property and sell it for the purpose of securing payment of a debt owing to him by the owner. It appeared that on the way to market defendant unloaded a portion of the seed, and sold the balance for more than enough to pay his debt. *Held*, that if the claim of right as to the original taking was correct, the sale of the balance would not constitute in itself a crime: *State v. Larson*, 52 N. W. R., 539.

The fact that property which is stolen and taken away in one transaction is owned by different persons does not make the taking separate offenses: *Ibid.*

Where a number of sacks of flax-seed were stolen, *held*, that while the taking of the first sack constituted larceny, yet the taking of additional sacks in the same transaction did not constitute more than one larceny: *Ibid.*

Where the indictment alleges that the defendant took, stole, and carried away, etc., contrary to the statute, etc., it is not necessary to allege that the act was feloniously done: *State v. Griffin*, 79–568.

Also *held*, that the allegation as to the ownership of the property was sufficient, without the use of the words "then and there:" *Ibid.*

Also *held*, that it is not necessary in such

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case to charge the intent to convert the property to defendant's use and deprive the owner thereof: *Ibid.*

It is erroneous to instruct the jury with reference to recent possession of stolen property, that if they are satisfied that the possession of the defendant was a guilty possession they should convict; such instruction would apply to a possession of goods received knowing them to be stolen: *State v. Tucker*, 76–232.

Where stolen property was found in the possession of defendant soon after it was stolen, *held*, that it was incumbent on him to make some reasonable explanation of his possession consistent with his innocence, and that, taking the evidence all together, it was proper to be submitted to the jury and sufficient to support the verdict: *State v. Whitmer*, 77–558.

Where cattle claimed to have been stolen were found at the place of defendant's father, where defendant made his home, *held*, that the question whether they were in defendant's possession or not was a question for the jury: *State v. Van Winkle*, 80–15.

One who assists in the disposition of stolen property will not be guilty of larceny, at least without a knowledge that it is stolen: *State v. Empey*, 79–460.

5211. Larceny from burning building, or from the person.

The offense here described differs from that of robbery in that the taking is without force or violence or putting in fear: *State v. Miller*, 49 N. W. R., 90.

5214. Embezzlement by public officer.

Failure to account for public money used by an officer as his own is necessary to constitute the crime of embezzlement: *Hale v. Richards*, 80–164.

Evidence that a public official charged with embezzlement had, at the time of such embezzlement, money on deposit in a bank to his credit officially, in excess of the amount which it is alleged he embezzled, is inadmissible where it does not tend to show that he did not misappropriate the money for which judgment is claimed: *Ida County v. Woods*, 79–148.

An allegation of the manner in which the defendant disposed of the money for which he failed to account is unnecessary and need not be proved: *State v. King*, 81–587.

Where the record of the board of supervisors was introduced to show the report of a defaulting treasurer, *held*, that there was no prejudice to defendant by its introduction, as the report itself was afterwards introduced: *Ibid.*

And where it was proved that the treasurer received the money, that the same was demanded of him, and he refused to turn it over, and that he made no explanation of how or in what manner he used the money, the evidence was sufficient to establish the crime of embezzlement: *Ibid.*

5215. Other embezzlement.

The taking of several articles may be charged in a single count of the indictment: *State v. Pierce*, 77–245.

Where the evidence was conflicting, but it was shown that defendant had converted to his own use certain property belonging to his principal, that he concealed the facts as to the disposition of some of the property, and rendered a false account of his agency with regard to it, *held*, that the evidence was sufficient to sustain a verdict of embezzlement: *Ibid.*

Where the indictment charged authority in defendant to sell the property to a particular person and there was evidence tending to show such authority, *held*, that it was not erroneous to convict defendant under the indictment, although there was evidence tending to show a general authority to sell to any one: *State v. Foley*, 81–36.

Where it appeared that defendant, intrusted as agent with the sale of certain diamonds, refused to account for them on demand at a time when the owner was entitled to an accounting, *held*, that the evidence was such as to warrant conviction: *Ibid.*

Instructions in a prosecution under this section as amended, against a loan agent for receiving money for the purpose of paying off liens upon land upon which a loan was negotiated and not paying the same out, and concealing his failure to do so, *held* correct in a particular case: *State v. Brooks*, 52 N. W. R., 240.

In such case, *held*, that the evidence sufficiently showed a refusal on the part of the defendant to account for the money: *Ibid.*

CHAPTER 5.

FORGERY AND COUNTERFEITING.

5223. Forgery.

The certificate referred to in this section is a certificate required by law, or which may be taken as legal proof of a fact: *State v. Rhine*, 50 N. W. R., 676.

And *held*, that a writing purporting to give consent of a parent to the marriage of a daughter stated therein to be of age was not such instrument that if falsely made the delivery thereof to the clerk for the purpose of procuring a license to marry such daughter would constitute a crime: *Ibid.*

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5224. Uttering forged instrument.

Where a party executing a mortgage pretended to get his wife's signature thereto, but in fact procured the same to be signed by his daughter, having the same name as his wife, and delivered the instrument to the mortgagee, *held*, that though he might be guilty of cheating by false pretenses, he was also guilty of uttering a forged instrument: *State v. Farrell*, 82–553.

And see notes to preceding section.

CHAPTER 6.

OFFENSES AGAINST PUBLIC JUSTICE.

5246. Acceptance of bribes by officers.

An officer having possession of property under a warrant may be guilty of receiving bribes for using his official position in procuring the release of the property: *State v. Potts*, 78–656.

5254. Sheriff or other officer receiving bribes.

The offense under this section of negotiating with a criminal for a bribe, for the omission on the part of the officer to discharge his duty, will not constitute the crime of threatening to accuse under § 5170: *State v. Pierce*, 76–189.

5259. Compounding felonies.

Where it appeared that notes and mortgages were given by the parents of one who was threatened with criminal prosecution for embezzlement, *held*, that such notes and mortgages were wholly without consideration and void, irrespective of whether the offense of embezzlement had been committed or not: *Smith v. Steely*, 80–738.

A contract to waive civil and criminal proceedings for seduction in consideration of certain payments of money and the conveyance of real estate, *held* invalid *in toto* on account of the stipulation as to criminal proceedings, and no defense in a civil action: *Baird v. Boehner*, 77–622.

5268. Resisting execution of process.

The offense described in this section may be committed by knowingly and wilfully resisting an officer in the discharge of his duties. Where the offense is described as resisting an officer while conveying a person to jail in a proper manner, it is not necessary to state the name of the person the officer had under arrest: *State v. Garrett*, 80–589.

The rightfulness of the arrest or the guilt of the party thus arrested cannot be inquired into in the prosecution of the person thus resisting the officer: *Ibid.*

CHAPTER 7.

MALICIOUS MISCHIEF AND TRESPASS ON PROPERTY.

5291. Trespass by digging, cutting, carrying away, etc.

An indictment which described the land upon which the trespass was committed as belonging to the estate and heirs of Madison Young, deceased, *held* not defective because it failed to give the names of the owners of the land: *State v. Paul*, 81–596.

5293. Injuries to buildings and fixtures.

Description of the building injured, *held* sufficient in a particular case, although the statement as to the ownership being in a certain corporation was erroneous: *State v. Semotan*, 51 N. W. R., 1161.

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CHAPTER 9.

OFFENSES AGAINST CHASTITY, MORALITY, AND DECENCY.

5317. Adultery.

The offense here described is a public offense, and the breaking or entering of a dwelling in the night time for the purpose of committing it is punishable as an offense against the public: *State v. Corliss*, 51 N. W. R., 1154.

Where a married man has criminal connection with a woman not his wife by force, he may be guilty of adultery although she has no criminal intent: *State v. Henderson*, 50 N. W. R., 758.

Where an instruction limited the jury in their inquiry as to the guilt of defendant to the act alleged to have occurred on the date named in the indictment, but allowed them to convict if they found that act to have been committed at any time within the statutory period, *held*, that there was no error of which the defendant could complain: *Ibid.*

It is the husband or wife of the person accused of the crime who by this section is required to commence the prosecution; but an unmarried person may be guilty of the crime, and in such case the complaint of the husband or wife of the other party to the crime will be sufficient: *State v. Mahan*, 81–121.

When the indictment does not show that the complaint is made by the husband or wife of the defendant it will not be presumed that such defendant is married unless that fact appears on the face of the indictment, and therefore, the fact not appearing, the indictment is not open to demurrer on that ground. The objection in such case is a matter of defense which defendant must prove in order to take advantage of it: *Ibid.*

The provision forbidding prosecution except on complaint of the husband or wife does not prescribe an element of the crime but simply limits the authority of the court to punish the crime in certain cases, and evidence that the prosecution was in fact commenced by the husband or wife may be introduced, though no averment of that fact is found in the indictment: *State v. Maas*, 49 N. W. R., 1037.

5321. Lewdness.

In a prosecution for keeping a house of ill-fame where the charge given by the court to the jury defined lewdness as the "irregular indulgence of the animal desires," *held*, that while the word "unlawful" instead of "irregular" would have been a more correct definition, yet the charge was not misleading or prejudicial to defendant: *State v. Toombs*, 79–741.

Where parties are jointly indicted for lewdly cohabiting together, declarations of one not made in the presence of the other may be shown as against the defendant making them, the jury being properly cautioned not to consider such evidence as against the other defendant. While in such case the guilt of one is inconsistent with the innocence of the other, yet the testimony may be sufficient to convict one and not the other: *State v. Miller*, 81–72.

5322. Keeping house of ill-fame.

The statute does not require that the place be used habitually or for any length of time for the prohibited purposes in order to constitute the offense: *State v. Lee*, 80–75.

It is not necessary to show that the place has a bad reputation: if it is shown that it is a place resorted to for the purpose of prostitution or lewdness, and that it is kept by defendant, it is sufficient: *Ibid.*

The term "house of ill-fame" is synonymous with "bawdy-house," having no reference to the fame of the place, or its reputation, but only to the purpose for which it is used: *Ibid.*

Prostitution implies indiscriminate sexual intercourse on the part of a woman which she invites or solicits, without regard to whether it be for gain or not: *State v. Clark*, 78–492.

Evidence in a particular case, *held* sufficient to support a verdict for keeping a house of ill-fame: *Ibid.*

An indictment which charged that defendant kept a house of ill-fame resorted to for purposes of prostitution or lewdness, *held* to charge but one offense, and therefore not void for duplicity: *State v. Toombs*, 79–741.

In a prosecution for keeping a house of ill-fame, evidence as to conversation of women resorting to the house, though such conversation was not in the presence of defendant, is admissible, as showing the character of the women: *Ibid.*

And where it is shown that lewd women made a certain house a place of resort, and men of licentious repute visited the place, the evidence of the bad reputation of the house is sufficient to sustain a verdict of keeping a house of ill-fame: *Ibid.*

5325. Enticing to house of ill-fame.

The inveigling or enticing of a female, before reputed virtuous, to a house of ill-fame, constitutes a complete offense, and to knowingly conceal, or assist or abet in concealing, such female so deluded or enticed for the purpose of prostitution or lewdness, constitutes another, and the two offenses, even though committed by the same person and in connection with the same female, cannot be charged in the same indictment: *State v. Terrill*, 76–149.

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5327. Evidence; reputation.

This section was not designed to add to the ingredients of the crime to require that a house should be generally reputed to be a house of ill-fame, but to enlarge the means of proving its true character. Evidence of the general reputation of the house is made competent but not conclusive means of proving its true character: *State v. Lee*, 80–75.

5335. Obscene literature; articles of immoral use.

This statute does not make illegal the sale of an instrument which is manufactured for a lawful purpose, such as an English catheter, although such sale is with the intention that the instrument be used in the attempt to procure an abortion: *State v. Forsyth*, 78–595.

5341a. Sodomy. 24 G. A., ch. 39. Any person who shall commit sodomy, shall be punished by imprisonment in the penitentiary not more than ten years nor less than one year.

5347. Gaming and betting.

Where it appeared that defendant was in a room where the crime of gambling was committed, and fled therefrom on the entrance of an officer, and no evidence was introduced tending to show that he was not guilty of the crime, *held*, that he was properly convicted: *State v. Boyer*, 79–380.

5348. Gaming contracts void.

Where a note was given for a sum claimed to be due under a written contract by which it was agreed between a person owning an interest in a shipment of cattle on its way to market and another, that if the cattle should sell for less than a certain price the difference should be paid by one party to the other, and if they sold for more than that the difference should be paid by the latter to the former, *held*, that the contract was void as a gambling contract, and the note given thereunder was also void even in the hands of the purchaser: *First Nat. Bank v. Carroll*, 80–11.

Anything which induces men to risk their money or property without any return except to get for nothing any given amount from another is gambling, and it is immaterial whether the transaction relates to actual property or not, if it does not involve a dealing with actual property: *Ibid.*

A note given for the sale of "prolific (or Bohemian) oats at $15 per bushel as a speculation," under a contract by which the seller agreed to resell for the buyer by a stated time a certain quantity of the same oats to be raised by the buyer, *held* not void as given in pursuance of a gambling contract, but *held*, that such contract was void as against public policy: *Hanks v. Brown*, 79–560; *Merrill v. Packer*, 80–542; *Shipley v. Reasoner*, 80–548.

5351. Incest.

Without determining whether § 5958 applies to prosecutions for incest or not, in a particular case *held*, that it was the province of the jury to say what weight should be given to the testimony introduced as corroborating: *State v. Moore*, 81–578.

CHAPTER 10.

OFFENSES AGAINST PUBLIC HEALTH.

5363. Adulterated milk, cheese, or butter. 4042; 24 G. A., ch. 50, § 1. If any person or corporation shall sell or exchange, or expose for sale or exchange, deliver or bring to another for domestic use, or to be converted into any product of human food whatsoever, any unclean, impure, unhealthy, adulterated, unwholesome or skimmed milk, or milk from which has been held back what is commonly known as strippings, or milk taken from an animal having disease, sickness, ulcers, abscess or running sore, or was taken from an animal fifteen days before, or less than five days after parturition, shall upon conviction thereof be fined not less than twenty-five dollars nor more than one hundred dollars and be liable in double the amount of damages to the person or persons upon whom such fraud shall be committed. Provided that the provisions of this act shall not apply to skimmed milk when it is sold as such.

[A substitute for the original section.]

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5363a. Milk; test. 24 G. A., ch. 50, § 2. For the purposes of this act, milk which is proved by any reliable method of test or analysis, to contain less than three pounds of butter fat to one hundred pounds of milk, shall be regarded as skimmed or partially skimmed milk.

5363b. Duty of commissioner. 24 G. A., ch. 50, § 3. It is hereby made the duty of the dairy commissioner to enforce the provisions of the foregoing sections.

5363c. Agents to collect samples. 24 G. A., ch. 50, § 4. The state dairy commissioner is hereby authorized to appoint agents in every city having over ten thousand inhabitants, in the state of Iowa, who are to collect the samples of milk as sold in such cities, and it shall be their duty to forward such samples to the office of the commissioner in Des Moines in such manner as he shall direct. The compensation of such agents at any one time, shall not be more than three dollars for collecting and delivering the same to the express companies.

5363d. Number of times. 24 G. A., ch. 50, § 5. The number of times samples are collected in each city of more than ten thousand inhabitants shall not exceed an average of thirty times during any one year.

[Section 6 of this act is inserted *supra*, as § 2514*a*.]

5363e. Permits to milk-dealers. 24 G. A., ch. 50, § 7. Every milk dealer who runs a milk wagon, milk depot or sells milk from a store, in the cities that have over ten thousand inhabitants, in the state of Iowa, shall obtain a permit from the state dairy commissioner's office for which he shall pay the sum of one dollar annually. The commissioner shall keep a book in which shall be registered the name, location and number of each dealer in milk, and a record of each analysis. Whoever violates the provisions of this section upon conviction thereof, shall be fined not less than ten dollars nor more than twenty-five dollars.

5363f. Authority to take samples. 24 G. A., ch. 50, § 8. The dairy commissioner or his agents shall have power and authority to open any can or vessel containing milk which is offered for sale, and may inspect the contents thereof and may take therefrom samples of milk for analysis.

5372. Compound lard.

The subject of this section is sufficiently described in the title of the legislative act as "an act to prevent fraud in the sale of lard and to provide punishment for the violation thereof," and it is therefore not invalid as in violation of section 29, article 3, of the constitution: *State v. Snow*, 81–642.

5379a. Health of female employees; seats provided. 24 G. A., ch. 47, § 1. It shall be the duty of all employers of females in any mercantile or manufacturing business or occupation to provide and maintain suitable seats, when practicable, for the use of such female employees, at or beside the counter or work-bench where employed, and to permit the use of such seats by such employees to such an extent as the work engaged in may reasonably admit of.

5379b. Penalty. 24 G. A., ch. 47, § 2. Any neglect or refusal to comply with section 1 of this act [§ 5379*a*] by any employer or employers, shall be deemed a misdemeanor and on being convicted of such refusal or neglect such employer or employers shall be punished by a fine not exceeding ten dollars at the discretion of the court and the costs of the suit.

5379c. Prosecutions. 24 G. A., ch. 47, § 3. It is hereby made the duty of the county attorney to prosecute all violations of this act upon the filing of an information by any citizen as required by section 4661, chapter eleven of the Code of Iowa [§ 6059].

5379d. 24 G. A., ch. 47, § 4. All acts or parts of acts inconsistent with this act are hereby repealed.

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CHAPTER 11.

OFFENSES AGAINST PUBLIC POLICY.

5386. Civil rights. 20 G. A., ch. 105, § 1; 24 G. A., ch. 43. All persons within this state shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, restaurants, chop houses, eating houses, lunch counters and all other places where refreshments are served; public conveyances, barber shops, bath houses, theaters and all other places of amusement; subject only to the conditions and limitations established by law and applicable alike to every person.

[As amended by inserting restaurants, etc., and bath houses.]

5402a. Repeal. 23 G. A., ch. 34, § 1. Sections 1, 2, 3, 4, 6, 7, 8, 9, 10 and 11 of chapter 50 of the acts of the Fifteenth General Assembly, chapter 70, acts of the Sixteenth General Assembly, sections 3, 5, 6, 7 and 8 of chapter 80, acts of the Seventeenth General Assembly, chapter 92, acts of the Eighteenth General Assembly, and chapter 9 acts of the Twentieth General Assembly [§§ 2303–2306, 2310–2312, 5403, 5404 and 5406–5411], are hereby repealed and the following enacted in lieu thereof.

5402b. Fishing except with hook and line prohibited. 23 G. A., ch. 34, § 2. It shall be unlawful for any person to take from any of the waters of the state any fish in any manner except by hook and line; except that it shall be lawful for any person to take minnows for bait with a seine that does not exceed five yards in length. Also that it shall be lawful to take buffalo and suckers by spearing between the first day of November and the first day of March following. The word minnows as used here does not include or apply to young bass, pike, crappies, trout, salmon, or fry of any game fish, either native or foreign; and all such fish, either young or adult, so taken, shall be immediately returned to the waters from whence taken. It shall be lawful for the state fish commissioner to take from any of the public waters in any manner any fish for the purpose of propagation or restocking other waters.

5402c. Fishing season. 24 G. A., ch. 34, § 3. It shall be unlawful for any person to catch or take from any of the waters of the state any salmon or trout between the first day of November and the first day of April following, or any bass, pike, crappies or any other game fish between the first day of November and the fifteenth day of May following in each year, in any manner whatsoever.

5402d. Sale or transportation. 23 G. A., ch. 34, § 4. It shall be unlawful for any person, company or corporation to buy, sell or offer for sale or have in his or their possession for sale or transportation any fish which shall have been taken in violation of sections 2 and 3 of this act [§§ 5402*b*, 5402*c*].

5402e. Penalty. 23 G. A., ch. 34, § 5. Any person found guilty of a violation of the preceding sections of this act [§§ 5402*b*–5402*d*] shall upon conviction before any justice of the peace, mayor of any incorporated town or city or any court of record within the county in which such offense is committed, be fined not less than ten nor more than fifty dollars and stand committed until such fine and costs are paid.

5402f. Obstructing passage. 23 G. A., ch. 34, § 6. No person shall place, erect or cause to be placed or erected, in or across any of the rivers, creeks, lakes, or ponds or any outlets or inlets thereto any trot line, seine, net, weir, trap, dam or other obstruction in such manner as to hinder or obstruct the free passage of fish up, down or through such water-course for the purpose of taking or catching fish unless the same be done under the super-

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vision of the fish commissioner, except minnows as provided in section 2 of this act [§ 5402*b*].

5402g. Poisons or explosives. 23 G. A., ch. 34, § 7. No person shall place in any of the waters of the state any lime, ashes, drug, or medicated bait or shoot any gun or use any dynamite, gun cotton, giant powder or other explosive or any electrical machine or device with the intent thereby to kill, injure, poison, stupefy or catch fish.

5402h. Penalty. 23 G. A., ch. 34, § 8. Any person found guilty of a violation of sections six or seven of this act [§§ 5402*f*, 5402*g*] shall, upon conviction before any justice of the peace, mayor of any incorporated town or city, or any court of record in the county in which such offense is committed, be fined not less than twenty-five dollars nor more than one hundred dollars, and stand committed until such fine is paid. And any seine, net, trap or other device used in violation of section six or seven of this act may be seized and destroyed by order of the court before whom such action may be brought.

5402i. Fee to informer. 23 G. A., ch. 34, § 9. In all prosecutions under sections 2, 3, 4, 5 and 13 of this act [§§ 5402*b*–5402*e*, 5402*m*] the person filing the information shall be entitled to a fee of five dollars which shall be taxed as costs against the person, company or corporation so convicted, and in all prosecutions under sections 6, 7 and 8 of this act [§§ 5402*f*–5402*h*] the persons filing the information shall be entitled to a fee of ten dollars, which shall be taxed as costs, as above provided, but in no case shall the fee of the informant be paid out of the county treasury. Any fish found in the possession of any person, company or corporation taken in violation of the preceding sections shall be seized and sold for the purpose of paying the costs in the case.

5402j. Ownership; punishment for unlawful taking; damages. 23 G. A., ch. 34, § 10. Persons raising or propagating fish on their own premises or owning premises on which there are waters having no natural outlet or inlet through which such waters may become stocked or replenished with fish from public waters shall absolutely own such fish as they may contain, and any person taking or attempting to take any fish therefrom without the consent of the owner or his agent shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five dollars nor more than twenty-five dollars, or imprisoned in the county jail not more than thirty days and shall be liable to the owner of the fish in damages, in double the amount of damages sustained, the same to be recovered in civil action before any court having jurisdiction over the same.

5402k. Certain rivers excepted. 23 G. A., ch. 34, § 11. Nothing herein contained shall be held to apply to fishing in the Mississippi, the Missouri or the Big Sioux rivers nor so much of the Des Moines river as forms the boundary between the states of Missouri and Iowa.

5402l. Duties of fish commissioner. 23 G. A., ch. 34, § 12. It shall be the duty of the fish commissioner to see that the provisions of this act are enforced and for that purpose he shall have the right to call to his assistance any prosecuting attorney to prosecute all violations of this act in the county where such violations occur. When requested by the fish commissioner, the

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authority of the state fish commissioner whenever a public highway crosses such stream. Any violation of this section shall be subject to the penalties prescribed in section 5 of this act [§ 5402*e*].

5402n. 24 G. A., ch. 34, § 14. All acts or parts of acts, inconsistent or in conflict herewith are hereby repealed.

5419a. Safety couplers on new cars. 23 G. A., ch. 18, § 1; 24 G. A., ch. 23, § 1. It shall be unlawful for any corporation, company or person operating any line of railroad within this state, any car manufacturers or transportation company using or leasing cars, to put in use in this state any new car or any old car that has been to the shop for general repairs to one or both of its draw-bars that is not equipped with automatic couplers so constructed as not to require any person or persons to be between the cars when the act of coupling or uncoupling is done.

5419b. Same on all cars; when. 23 G. A., ch. 18, § 2; 24 G. A., ch. 23, § 2. After January first, 1898, it shall be unlawful for any corporation, company or persons operating a railroad, or any transportation company using or leasing cars of any description and used in the commerce of the country, or in the construction of railroads, to have upon any railroad in Iowa for use in the transportation of freight or passengers any car that is not equipped with such safety automatic coupler as provided for in section one of this act [§ 5419*a*].

5419c. Power brakes on locomotives. 23 G. A., ch. 18, § 3; 24 G. A., ch. 23, § 3. It shall be unlawful for any corporation, company or person operating any line of railroad in this state, to use any locomotive engine upon any railroad or in any railroad yard in this state after the first day of January, 1895, that is not equipped with a proper and efficient power brake, commonly called a "driver brake."

5419d. Power brakes on trains. 23 G. A., ch. 18, § 4; 24 G. A., ch. 23, § 4. It shall be unlawful for any corporation, company or person operating a line of railroad in this state, to run any train of cars after the first day of January, 1895, that shall not have in that train a sufficient number of cars with some kind of efficient automatic or power brakes so that the engineer upon the locomotive car can control the train without requiring brakemen to go between the ends or on the top of the cars to use, as now, the common hand brake.

5419e. Reports as to cars. 23 G. A., ch. 18, § 5. Every railroad corporation, company or person operating a railroad in this state, and every person or persons using or leasing cars in the transportation business, or in building railroads, shall, and are by this act required to include in their annual report to the state railroad commissioners the number of locomotive engines and cars used in this state and what number is equipped with automatic power brakes and what number of cars equipped with automatic safety couplers and the kind of brakes and couplers used and the number of each kind, when more than one kind is used.

5419f. Penalty. 23 G. A., ch. 18, § 6. Any corporation, company or person operating a railroad in this state, and using a locomotive engine or running a train of cars or using any freight, way or other car, contrary to the provisions of this act, shall be deemed guilty of a misdemeanor, and shall be subject to a fine of not less than five hundred dollars, or not more than one

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in the employ of such corporation, company or person running such engine or trains or cars contrary to this law.

5419g. Railroad commissioners may extend time. 24 G. A., ch. 23, § 5. The board of railroad commissioners shall have power, upon a showing which it shall deem reasonable, to extend the time within which any such corporation shall be required to comply with the provisions of this act; except that no such extension shall be made beyond 1900. After the first day of January, 1900, any common carrier shall refuse to accept or receive from any connecting line any car to be used within this state that is not fully equipped as required by this act.

5422. Canada thistles. 4062; 24 G. A., ch. 45, § 2. If any person or corporation, after having been notified in writing of the presence of Canada thistles, or *Cnicus Lanceolatus*, on any lands owned or occupied by such person or corporation; or if any highway supervisor, after having been notified in writing of the presence of any such thistles on the highway under his jurisdiction, shall permit such thistles or any part thereof to blossom or mature, such person, corporation, or highway supervisor, shall be deemed guilty of a misdemeanor and be punished accordingly.

[As amended by the insertion of the botanical name. The first section of the act amends § 1509.]

CHAPTER 12.

OFFENSES AGAINST PUBLIC PEACE.

5438. Breach of Sabbath.

A promissory note made on Sunday is void, but if ratified by partial payment upon a secular day, it will be valid from the date of the ratification, and a ratification by one partner or joint maker will be binding upon the other partners or joint makers, and payment upon the note will be a ratification of the mortgage by which such note is secured: *Russell v. Murdock*, 79–101.

Where the parties traded horses on Sunday and on the next day plaintiff tendered back the animal received by him, *held*, that he was not thereupon entitled to maintain replevin for the animal which he gave in exchange: *Kelley v. Cosgrove*, 48 N. W. R., 979.

CHAPTER 13.

CHEATING BY FALSE PRETENSES, GROSS FRAUDS, AND CONSPIRACY.

5439. False pretenses.

An indictment charging defendant with obtaining money and other property of value stated by means of false pretenses, consisting of representations that a draft given by defendant, a banker, in exchange for property was drawn against funds with which it would be paid on presentation, and that the person from whom the property was procured by means of such draft believed and relied on such representations and was deceived by them, is sufficient to charge an offense under this section: *State v. Cadwell*, 79-473.

A member of a firm doing a banking business and acting as cashier of the bank is not guilty of procuring property by false pretenses in issuing in the name of the bank a draft upon another bank under the assumption that the latter has deposits to the credit of the former. Under an indictment charging defendant with falsely drawing a draft against funds in such other bank, the fact that such person might be liable on the draft as a partner of the firm drawing it does not make it his individual draft within the meaning of such indictment: *Ibid.*

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5445a. Protection of trade marks and labels. 24 G. A., ch. 36, § 1. Whenever any person, association or union of workingmen and others have adopted, or shall hereafter adopt, for their protection any label, trade mark, or form of advertising, it shall be unlawful for any person or corporation to counterfeit or imitate such label, trade mark or form of advertisement. Every person violating this section shall upon conviction be punished by imprisonment in the county jail for not more than thirty days, or by a fine of not less than twenty-five dollars, nor more than one hundred dollars.

5445b. Penalty for imitation. 24 G. A., ch. 36, § 2. Every person who shall use any counterfeit or imitation of any label, trade mark or form of advertisement of any such person, union or association, knowing the same to be a counterfeit or imitation, shall be guilty of a misdemeanor, and shall be punished as provided in section one [§ 5445*a*].

5445c. Filing for record. 24 G. A., ch. 36, § 3. Every such person, association or union that has heretofore adopted, or shall hereafter adopt a label, trade mark or form of advertisement as aforesaid, shall file the same for record in the office of secretary of state, by leaving two copies, counterparts or fac similes thereof with the secretary of state; said secretary shall deliver to such person, association or union so filing the same a duly attested certificate of the record of the same, for which he shall receive a fee of one dollar. Such certificate of record shall in all suits and prosecutions under this act be sufficient proof of the adoption of such label, trade mark, or form of advertisement, and the right of said person, association or union to adopt the same.

5445d. Injunction. 24 G. A., ch. 36, § 4. Every such person, association or union adopting a label, trade mark, or form of advertisement as aforesaid, may proceed by suit to enjoin the manufacture, use, display, or sale of any such counterfeits or imitations; and all courts having jurisdiction thereof shall grant injunctions to restrain such manufacture, use, display, or sale, and shall award the complainant in such suit, such damages, resulting from such wrongful manufacture, use, display, or sale, and a reasonable attorney's fee to be fixed by the court, as may by said court be deemed just and reasonable, and shall require the defendants to pay to such person, association or union the profits derived from such wrongful manufacture, use, display, or sale, and a reasonable attorney's fee to be fixed by the court, and said court shall also order that all such counterfeits or imitations in the possession or under the control of any defendant in such case be delivered to an officer of the court to be destroyed.

5445e. Unlawful use. 24 G. A., ch. 36, § 5. Every person who shall use or display the genuine label, trade mark, or form of advertisement of any such person, association or union, in any manner not authorized by such person, union or association, shall be deemed guilty of misdemeanor, and shall be punished as provided in section one [§ 5445*a*].

5445f. Unincorporated associations. 24 G. A., ch. 36, § 6. In all cases where such persons, association or union is not incorporated, suits under this act may be commenced and prosecuted by any such person, officer or member of such association or union on behalf of, and for the use of such person, association or union.

5445g. Unlawful use of name or seal. 24 G. A., ch. 36, § 7. Any person or persons who shall in any way use the name or seal of any such person, association or union, or officer thereof, in and about the sale of goods or otherwise, not being authorized to so use the same, shall be guilty of a misdemeanor and shall be punished as provided in section one [§ 5445*a*].

5445h. 24 G. A., ch. 36, § 8. All acts and parts of acts in conflict herewith are hereby repealed.

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5453a. Pools and trusts. 23 G. A., ch. 28, § 1. If any corporation organized under the laws of this or any other state or country, for transacting or conducting any kind of business in this state, or any partnership or individual or other association of persons whosoever, shall create, enter into, or become a member of, or a party to, any trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual, or any person or association of persons, to regulate or fix the price of any article of merchandise or commodity, or shall enter into, become a member of or party to any pool, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this state, shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to indictment and punishment as provided in this act.

5453b. Corporations not to form trusts. 23 G. A., ch. 28, § 2. It shall not be lawful for any corporation to issue or to own trust certificates, or for any corporation, agent, officer or employees, or the directors or stockholders of any corporation, to enter into any combination, contract or agreement with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which combination, contract or agreement shall be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article.

5453c. Penalties. 23 G. A., ch. 28, § 3. If a corporation or a company, firm or association, shall be found guilty of a violation of this act, it shall be punished by a fine of not less than one per cent. of the capital stock of such corporation or amount invested in such company, firm or association, and not to exceed twenty per cent. of such capital stock or amount invested. Any president, manager, director or other officer or agent or receiver of any corporation, company, firm or association, or any member of any company, firm or association, or any individual, found guilty of a violation of the first section of this act [§ 5453*a*], shall be punished by a fine of not less than five hundred dollars, nor to exceed five thousand dollars, and in addition thereto may be imprisoned in the county jail not to exceed one year.

5453d. Contracts void. 23 G. A., ch. 28, § 4. Any contract or agreement in violation of any provisions of the preceding sections of this act shall be absolutely void.

5453e. Illegality as defense. 23 G. A., ch. 28, § 5. Any purchaser of any article or commodity from any individual, company or corporation transacting business contrary to any provisions of the preceding sections of this act shall not be liable for the price or payment of such article or commodity, and may plead this act as a defense to any suit for such price or payment.

5453f. Corporation to forfeit charter. 23 G. A., ch. 28, § 6. Any corporation created or organized by or under the law of this state which shall violate any provision of the preceding sections of this act shall thereby forfeit its corporate right and franchises, and its corporate existence shall thereupon cease and determine as provided in this section and it shall be the duty of the secretary of state, after the passage of this act, to address to the president, secretary or treasurer of each incorporated company doing business in this state, a letter of inquiry as to whether the said corporation has merged all or any part of its business or interest in or with any trust, combination or association of persons or stockholders as named in the preceding provisions of this act, and to require an answer, under oath, of the president, secretary,

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treasurer or any director of said company; a form of affidavit prescribed by the secretary of state shall be inclosed in said letters of inquiry, and on refusal to make oath in answer to said inquiry, the secretary of state shall immediately ca[u]se a certified statement of the facts to be filed in the office of the attorney-general of the state who shall proceed, or direct such proceedings by any county attorney in the state, to commence an action in the district court of any county in the state of competent jurisdiction. When said proceedings are instituted they shall be conducted as ordinary law actions triable by court or jury. On the final decision of the same should the defendant be found guilty of a violation of any of the provisions of this act, said court shall render a judgment and order a revocation of the charter of said company as a penalty for the violation, or violation for which the said company shall be found guilty, and the secretary of state shall make publication of such revocation in four newspapers in general circulation in the four largest cities of the state.

5453g. Notice by secretary of state. 23 G. A., ch. 28, § 7. It shall be the duty of the secretary of state upon satisfactory evidence that any company or association of persons duly incorporated and operating under the laws of this state have entered into any trust, combination or association as provided in the preceding provisions of this act, to give notice to such corporation that unless they withdraw from and sever all business connection with said trust, combination or association, their charter will be revoked at the expiration of thirty days from date of such notice.

5453h. Prosecutions. 23 G. A., ch. 28, § 8. It shall be the duty of the prosecuting attorneys in their respective jurisdictions, and the attorney-general, to enforce the foregoing provisions of this act, and any prosecuting attorney, or the attorney-general, securing a conviction under the provisions of this act, shall be entitled, in addition to such fee or salary as by law he is allowed for such prosecution, to one-fifth of the fine recovered. When the attorney-general and prosecuting attorney act in conjunction in the prosecution of any case, under the provisions of this act, they shall be entitled to one-fourth of the fine recovered which they shall divide equally between them, where there is no agreement to the contrary, and it shall be the duty of the grand jury to inquire into and ascertain if there exists any pools, trusts, combinations within their respective counties.

5453i. 23 G. A., ch. 28, § 9. Chapter 84, acts of the Twenty-second General Assembly [§§ 5454–5457], and all acts or parts of acts in conflict with the provisions of this act, are hereby repealed.

5459. Swindling in sale of grain or seed.

In a particular case, there being some evidence from which it was claimed that the transfer of the note in question, which was of the character referred to in this section, was not made until after the act took effect, *held*, that it was not error to instruct the jury as to the effect of the act: *Merrill v. Hole*, 52 N. W. R., 4.

As to the validity of such notes given before the passage of this act, see notes to § 5848.

CHAPTER 14.

NUISANCES, AND ABATEMENT THEREOF.

5470. What deemed nuisance.

It is a nuisance to corrupt and render unwholesome and impure the waters of a stream, without regard to the number of persons injuriously affected thereby: *State v. Smith*, 82–423.

Where offensive matter is discharged into a

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stream in one county, and renders impure the waters of such stream as it flows through another county, the offense is one partly committed in each county, and indictable in either, under § 5548: *Ibid.*

A party who contributes to the contamination of water in a stream is guilty under this section: *Ibid.*

In a particular case, *held*, that the defendant was sufficiently in control of the manufactory which caused the pollution of the water in a stream to render him criminally liable under this section: *Ibid.*

Where a railroad company was indicted for obstructing a street, and the act was charged to have been done on a certain day, and an objection was made to evidence which tended to show that on different days, both before and after the finding of the indictment, the defendant obstructed the street, *held* that the objection was properly overruled and that defendant should have moved the court to compel the prosecution to elect on which offense it would claim a verdict: *State v. Chicago, M. & St. P. R. Co.*, 77–442.

And *held*, that the court rightly directed the jury that defendant was guilty if it unreasonably obstructed the street within the time mentioned in the indictment: *Ibid.*

And *held* also, that an obstruction to a highway will not be excused on the plea of its being necessary for the carrying on of the party's business, though such obstruction is only occasional: *Ibid.*

An instruction that it was sufficient to find the defendant guilty if the street was wilfully obstructed, and that to act wilfully means to act intentionally and knowingly, *held* not erroneous when taken in connection with other paragraphs where the jury were instructed that to find the defendant guilty they must find that the obstruction complained of was unreasonable: *Ibid.*

5473. Punishment and abatement.

A judgment abating a liquor nuisance and ordering a sale of the furniture and fixtures used in the premises for carrying on the business, and ordering that the business should be closed for a year, is fully authorized by § 2389: *State v. Adams*, 81–595.

CHAPTER 15.

LIBEL.

5478. What constitutes.

An indictment charging matter published to be false and that it was written and published by defendant wilfully and maliciously and for criminal purposes, *held* sufficient without an allegation that it was not privileged, the question of privilege being one of defense: *State v. Conable*, 81–60.

Where the indictment charged libel in the publication of certain matter with reference to a person who was congressman and a candidate for re-election, *held*, that other portions of the article not set out in the indictment and other articles published about the same time were properly admitted in evidence as indicating a feeling on the part of defendant which might aid the jury in determining his real motives in pursuing the course he did: *Ibid.*

The matter set out charging a corrupt agreement with reference to the appointment of a postmaster, without naming the person who was by such agreement to be appointed, *held*, that a witness was properly allowed to testify that he was the person referred to and that no such corrupt agreement was made: *Ibid.*

Where in such case defendant sought to introduce in evidence an affidavit sent to him before such publication, stating the fact on which such publication was based, *held*, that while such affidavit was admissible, yet, under the circumstances, defendant had not taken the proper steps to have it considered in evidence: *Ibid.*

In such case, *held*, that defendant could be asked as to whether he had not previously supported the candidate referred to for congress and sought from him recommendation for an official appointment which he had not received, as tending to show that his course was prompted by disappointment and not by proper motives: *Ibid.*

Under the circumstances of the particular case, *held*, that while the jury might well have found that the article in question was privileged, yet there was not such lack of evidence in support of the verdict of guilty as to require reversal: *Ibid.*

5480. Truth given in evidence.

The fact that the matter published is privileged will not constitute a defense unless it is published with good motives and for a justifiable end: *State v. Conable*, 81–60.

5483. Law and fact.

Section applied: *State v. Conable*, 81–60.

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TITLE XXV.

CRIMINAL PROCEDURE.

CHAPTER 1.

PUBLIC OFFENSES.

5485. Felony.

Adultery is a public offense, within the provisions of this section: *State v. Corliss*, 51 N. W. R., 1154.

5488. All offenses bailable except.

A person convicted of murder in the second degree cannot be admitted to bail pending an appeal from the judgment of conviction: *Baldwin v. Westenhaver*, 75-547.

CHAPTER 5.

VAGRANTS.

5526a. 23 G. A., ch. 43, § 1. Chapter 69, laws of the Sixteenth General Assembly [§§ 5527, 5528], is hereby repealed.

5526b. Who deemed tramp. 23 G. A., ch. 43, § 2. Any male person sixteen years of age or over, who is physically able to perform manual labor, and is a vagrant within the purview of section 4130 of the Code [§ 5512], who is found wandering about practicing common begging, or is wandering about having no visible calling or business to maintain himself and unable to show reasonable efforts and in good faith to secure employment shall be deemed a tramp.

5526c. Punishment. 23 G. A., ch. 43, § 3. Any person convicted of being a tramp shall be punished by imprisonment at hard labor in the county jail not exceeding ten days, or by imprisonment in such jail in solitary confinement not exceeding five days.

5526d. Intimidation or other misconduct by. 23 G. A., ch. 43, § 4. Any tramp who shall wantonly or maliciously, by means of violence, threats, or otherwise, put in fear any inhabitant of this state, or who shall enter any public building, house, barn or out-building belonging to any other person, with intent to commit some unlawful act, or who shall carry any fire-arm or other dangerous weapon, or who shall indecently expose his person, or who shall be found drunk or disorderly, or shall commit any offense against the laws of this state for which no greater punishment is provided, shall be guilty of a misdemeanor and on conviction thereof, shall be punished by imprisonment at hard labor in the county jail not exceeding thirty days, or by imprisonment in such jail in solitary confinement not exceeding ten days, nor less than three days.

5526e. Tried jointly. 23 G. A., ch. 43, § 5. If two or more tramps shall assemble or congregate together within this state, they shall be tried jointly by the court before whom they shall be brought and the justice of the peace,

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mayor or police magistrate shall only be entitled to fees as in proceedings for the arrest and trial of one person.

5526f. Fees of officers. 23 G. A., ch. 43, § 6. The board of supervisors shall at their regular meeting held in June of each year fix the compensation to be allowed to the officers under this act. To the trial magistrate not exceeding two dollars and to the peace officer for all service, except making arrest, not more than one dollar and mileage as now allowed by law and for making arrest the same fee as now allowed for similar service in other cases.

5526g. Method of imprisonment. 23 G. A., ch. 43, § 7. It shall be unlawful for any sheriff, or the keeper of any jail to permit any person convicted under this act to have or possess any tobacco, intoxicating liquors, sporting or illustrated newspaper, cards, or any other article of amusement or pastime, or to permit such person to be kept or fed otherwise than stated in the commitment, and any sheriff or keeper of any jail, or other person who shall in any manner knowingly violate this section, shall, upon conviction thereof, be punished by a fine not exceeding one hundred dollars, nor less than twenty-five dollars.

5526h. Unlawful fees. 23 G. A., ch. 43, § 8. Any officer or magistrate who shall conspire with any other officer or person for the purpose of increasing the emoluments of his office, or for any other unlawful purpose, to evade the provisions of this act, or who shall, with such intent, in any manner, or by any means, encourage such tramp to remain within his bailiwick or jurisdiction, or to come within the same, shall, upon conviction thereof, be punished by a fine not exceeding one hundred dollars, and shall be committed until said fine and costs in said trial are paid, but not to exceed thirty days.

5526i. Hard labor. 23 G. A., ch. 43, § 9. It shall be the duty of the sheriff or keeper of any jail, under the direction of the board of supervisors, as provided in chapter 153, of the laws of the Twenty-first General Assembly [§ 6138], or as otherwise provided by law, to keep all persons sentenced to imprisonment at hard labor in such jail under this act, at work according to law, doing such work as the board of supervisors may provide, and such sheriff or keeper is hereby authorized, and it is made his duty to appoint or detail any deputy or other police officer to guard such prisoners while at work. Or he may turn over such prisoners to the municipal authorities of any city or town, to be by them worked on the streets or at such labor as the town may provide.

5526j. Solitary confinement. 23 G. A., ch. 43, § 10. Any tramp who has been duly sentenced to hard labor under the provisions of this act, who wantonly or wilfully refuses to work, shall be punished by such jailor while so refusing, by imprisonment in solitary confinement in the county jail not exceeding ten days during which time he shall be fed on bread and water; provided, that such punishment shall not exceed the time for which he is sentenced.

5526k. Compensation for keeping. 23 G. A., ch. 43, § 11. Hereafter no sheriff or jailor shall receive, and no board of trustees shall allow, any compensation for keeping or boarding any tramp in the jail or any other place of any county in this state, unless such tramp shall have been duly arrested or committed under the provisions of this act; provided, that the board of supervisors of each county shall have power to furnish one night's lodging only for apparently deserving persons and provided farther that all such persons who are sick or disabled, may be cared for as the necessities of the case demand. And all county officers shall comply with the requirements of the board of supervisors in relation to the persons mentioned in this section.

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CHAPTER 7.

LOCAL JURISDICTION OF PUBLIC OFFENSES.

5543. Offense partly in county.

The provisions of this section are applicable to a case where offensive matter is discharged into a stream in one county, and renders impure the waters of such stream as they flow through another county: *State v. Smith*, 82–423.

The provisions of this section are applicable to a prosecution for keeping a liquor nuisance: *State v. Rockwell*, 82–429.

Where orders for intoxicating liquors are taken by an agent in one county, subject to approval by the principal in another county, the sale in either county being illegal, the offense is partly committed in each county and the courts of either have jurisdiction of the offense: *State v. Kriechbaum*, 81–683.

CHAPTER 8.

TIME OF COMMENCING CRIMINAL ACTIONS.

5553. Defendant out of state.

Section applied: *State v. Moore*, 78–494.

CHAPTER 10.

WARRANTS OF ARREST ON PRELIMINARY INFORMATION.

5573. Order for bail.

The accused may be admitted to bail without appearing before a magistrate, and surety on the bail bond cannot object that the bond was signed and accused released before he was brought before the magistrate under a warrant: *State v. Benzion*, 79–467.

CHAPTER 11.

ARREST, AND BY WHOM AND HOW MADE.

5584. By peace officer without warrant.

Where an officer claims to act under a warrant he cannot justify, when sued for damages for having the wrong person, by showing that he had a right to make such arrest without warrant: *Holmes v. Blyler*, 80–365.

CHAPTER 12.

PRELIMINARY EXAMINATION.

5614. Adjournment; for how long.

Adjournment may be made with the consent of the defendant, and the surety on his bail bond cannot object that such adjournment was without the knowledge or consent of such surety: *State v. Benzion*, 79–467.

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5617. Witnesses.

A witness who in another state accepts service of a subpœna issued by a justice of the peace in a criminal case before any information is filed before him charging the commission of a crime, and thereunder attends a preliminary examination, cannot recover from the county witness fees for such attendance: *Warnstaff v. Louisa County*, 76–585.

5624. Minutes of examination.

The minutes of the evidence taken down in accordance with the provisions of this section may be used before the grand jury under the provisions of § 5656, although the person taking down the evidence is not sworn, and the minutes are not verified by the magistrate nor signed by the witnesses: *State v. Wise*, 50 N. W. R., 59.

5631. Witnesses bound over.

These provisions are limited to preliminary examination before magistrates and are not to be extended under § 5770, so as to authorize a judge to require security for the appearance of a witness on change of venue under penalty of confinement of the witness: *Comfort v. Kittle*, 81–179.

CHAPTER 13.

SELECTING, DRAWING, SUMMONING, AND IMPANELING OF THE GRAND JURY.

5639. Method; vacancies filled.

At a term subsequent to the first term of the year, the grand jury must appear without being summoned, and may be required to appear, and may lawfully transact business on the first day of the term: *State v. Standley*, 76–215.

Where the precise number of grand jurors to fill the panel appears, after certain ones are excused, they may be impaneled and sworn, without being drawn by lot: *Ibid.*

Where prior to impaneling a grand jury one of the jurors was excused, and the other persons not drawn had not yet been discharged, and the sheriff under the direction of the court selected one of the jurors not drawn to take the place of the juror excused, *held*, that the grand jury consisting of the six jurors not discharged and the one selected by the sheriff was properly constituted; and *held* also that it was immaterial whether the person thus selected was one of the jurors not drawn, or any other person qualified to serve as juror. A vacancy in the number of jurors, or the place of one excused, is to be filled by the sheriff: *State v. Gurlagh*, 76–141.

5644. Challenges by defendant.

Where one of the grand jurors who found an indictment for murder had talked with others in regard to lynching the defendant, but there was no evidence that he favored such step, and his examination failed to show that he had formed any prejudice or opinion that would disqualify him from acting as a grand juror, *held*, that there was no error in overruling a challenge to him: *State v. Billings*, 77–417.

5647. Challenge to juror; effect of allowance.

Where the grand jury consists of five members and a challenge as to one of them is sustained, the remaining four may find a valid indictment: *State v. Billings*, 77–417.

CHAPTER 14.

THE POWERS AND DUTIES OF THE GRAND JURY.

5656. Evidence.

Minutes of the testimony of witnesses on a preliminary examination when taken in accordance with the provisions of § 5624 may be made the basis of an indictment by the grand jury, although such minutes are not verified or taken down by a person sworn, nor verified by the magistrate, nor signed by the witnesses, such steps not being required by that section: *State v. Wise*, 50 N. W. R., 59.

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CHAPTER 15.

THE FINDING AND PRESENTMENT OF INDICTMENT.

5676. Names of witnesses indorsed on indictment.

An objection that the name of the witness is not indorsed on the indictment may be a ground of motion to set aside the indictment, but it is no reason for excluding the evidence where the witness was examined before the grand jury and the minutes of his evidence were returned: *State v. Story*, 76–262.

Where an indictment is found on the minutes of evidence taken before a committing magistrate, the names of the witnesses whose testimony is thus preserved and considered by the grand jury may be indorsed on the indictment: *State v. Wise*, 50 N. W. R., 59.

5679. Indictment presented.

A copy of a lost indictment when substituted for the original is in effect the original and is to be so treated, and it is immaterial that the jury are sworn to try the case upon the indictment as returned by the grand jury and not upon the copy substituted therefor: *State v. Shank*, 79–47.

Where in the commencement of the indictment the time of the commission of the offense was by mistake given as of a date subsequent to the finding of the indictment, but the date was correctly stated in the body of the indictment, *held*, that it was not error for the court on motion to correct such clerical mistake: *State v. Brooks*, 52 N. W. R., 240.

CHAPTER 16.

INDICTMENT, ITS FORM AND REQUISITES.

5681. What must contain.

The offense charged in the indictment is determined by the statement of facts in the indictment, and not by the designation given to the offense in the caption: *State v. Wyatt*, 76–328.

As to sufficiency of the averments of an indictment for obtaining property by false pretenses, see *State v. Cadwell*, 79–473.

An indictment for assault with intent to commit great bodily injury, *held* not sufficient where the charge was an assault with a deadly weapon and the infliction of great bodily injury, it not being directly alleged that the assault was with such intent: *State v. Clark*, 80–517.

In an indictment for resisting an officer who has a person under arrest, it is not necessary to state the name of the person under arrest: *State v. Garrett*, 80–589.

5683. Must be direct and certain.

An allegation that defendant did the act constituting the offense will support a conviction on evidence that such act was done by defendant through an authorized agent: *State v. Cadwell*, 79–482.

An indictment charging an assault with a deadly weapon with intent to strike and bruise, etc., and the infliction upon prosecutor of great bodily injury, does not sufficiently charge an assault with intent to commit great bodily injury: *State v. Clark*, 80–517.

5685. Must charge but one offense.

In cases of larceny and similar offenses, an indictment, in which the taking of several articles is charged in a single count, is not bad for duplicity: *State v. Pierce*, 77–245.

It is proper in different counts to charge the same offense in different forms: *State v. Potts*, 78–656.

Where a party is found guilty upon one of several counts of an indictment, the legal inference will be that he was acquitted upon the others: *State v. Severson*, 79–750.

The offenses under § 5325 of enticing a female to a house of ill-fame, and of knowingly concealing such female for the purpose of prostitution, constitute distinct offenses, which cannot be charged in the same indictment, although committed by the same person in connection with the same female: *State v. Terrill*, 76–149.

Where one count of an indictment charged the crime of murder by an attempt to produce an abortion with some instrument to the grand jurors unknown, and the second count charged that the crime had been committed by administering certain drugs to the grand jurors unknown, *held*, that there was but one crime charged and the indictment was not bad for duplicity: *State v. Baldwin*, 79–714.

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An indictment which charged the keeping of a house of ill-fame, resorted to purposes of prostitution or lewdness, *held* to charge but one offense and not void for duplicity: *State v. Toombs*, 79–741.

An indictment for trespass upon the land of another, committed by cutting and carrying away trees, which charged that the trees were cut and taken from different sections not contiguous, *held* to charge but one offense if the cutting was at a single time: *State v. Paul*, 81–596.

And while the offense may consist in wilfully cutting, or wilfully destroying, or wilfully carrying away, under § 5291, yet if the cutting and carrying away are one transaction, they constitute a single offense: *Ibid.*

Where an indictment for setting fire to material with intent to burn a building also charged the actual burning of the building, *held*, that the latter allegation was intended only to show the intent with which the act was done and did not constitute a charge of a distinct offense: *State v. Hull*, 48 N. W. R., 917.

The stealing in one transaction of property of different owners constitutes but one offense of larceny: *State v. Larson*, 52 N. W. R., 539.

5686. Time.

While the proof of the commission of an offense is not usually limited to the specified time or date charged in the indictment, yet where in two indictments for the crime of nuisance in keeping a place for the illegal sale of intoxicating liquors the time was so charged that it appeared that one offense was committed prior to the amendment of the law fixing the penalty for such offense, and that the other was committed subsequently to such time, *held*, that an acquittal under the latter indictment would not bar a prosecution under the former: *State v. Webber*, 76–686.

It is sufficient if the offense be shown to have been committed at any time within the period of the statute of limitations: *State v. Moore*, 78–494.

5687. Name of person injured.

The offense of injuring and defacing a building was charged as committed with reference to a building known as "National Hall" in a certain town. *Held*, that this sufficiently described the offense so that if the ownership of the building was erroneously stated to be in a corporation the variance was not fatal: *State v. Semotan*, 51 N. W. R., 1161.

5688. Construction.

In a prosecution for seduction, an indictment charging the seduction of "Mary E. Starner, being then and there an unmarried female of previously chaste character," *held* sufficient to indicate that the charge had reference to the seduction of a woman: *State v. Hemm*, 82–609.

5689. Words of statute.

An indictment in the language of the statute is sufficient, and is not open to objection on account of its form: *State v. Toombs*, 79–741.

An information in the language of the statute, so far as is necessary to constitute the offense, is sufficient: *State v. Snow*, 81–642.

5690. What indictment must show.

The offense charged in the indictment is determined by the statement of facts therein, and not by the designation given to the offense in the caption: *State v. Wyatt*, 76–328.

The conclusion of the indictment cannot be considered to help out the charging part where the latter is defective: *State v. Andrews*, 50 N. W. R., 549.

An indictment is sufficient which is intelligible to a person of ordinary understanding: *Bayard v. Baker*, 76–220.

While it would be better practice to allege the venue by express averments in the body of the indictment, yet if the words used are such that by reference to the caption it can be understood that the crime was committed within the jurisdiction of the court, the indictment is sufficient: *State v. Salts*, 77–193.

Under an indictment charging the commission of a crime defendant may be convicted on proof of having aided or abetted in its commission, and evidence of a conspiracy to commit a crime in which defendant participated and which was carried out by the others is admissible: *State v. Munchrath*, 78–268.

An indictment for maintaining a nuisance which charged that defendant did unlawfully establish, keep, use and maintain a certain building and place in which he owned and kept intoxicating liquor with intent to sell and give the same away in violation of law, and did at the aforesaid times and places so unlawfully sell and give away such intoxicating liquor, *held* to sufficiently charge the keeping of the place where the forbidden acts were done: *State v. Price*, 75–243.

Where an indictment charged the keeping of a certain building as a nuisance on a certain date and on divers other days and times between that date and the finding of the indictment, and then stated that "the building is situated in Franklin county, Iowa," *held*, that the indictment alleged with sufficient certainty that the offense was committed in Franklin county: *State v. Jacobs*, 75–247.

In a particular case, *held*, that the name of the person injured was sufficiently shown by the indictment: *State v. Shinner*, 76–147.

It is not necessary in an indictment for rape to charge that the act was feloniously done where it appears that the assault was unlawful and felonious and that the act was by force

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and against the will of the person injured: *State v. Casford*, 76–330.

Where the indictment named the defendant George M. Bowman, while George J. Bowman was arrested and put on trial, *held*, that the jury were properly directed to consider the guilt of the person on trial, although there was another person named George M. Bowman: *State v. Bowman*, 78–519.

In an indictment for larceny, *held*, that it was not necessary to allege the act as felonious, nor to use the words "then and there" in the averment of the ownership of the property, nor to charge an intent to convert the property to defendant's use and deprive the owner thereof: *State v. Griffin*, 79–568.

Where the indictment charged embezzlement, alleging authority given to defendant as agent to sell certain property to a particular person, *held*, that evidence showing a general authority to sell to any one did not constitute a variance, there being some evidence of the special authority as alleged in the indictment: *State v. Foley*, 81–36.

The indictment must show on its face that the offense which it charges is triable at the court to which it is returnable: *State v. Mahan*, 81–121.

Therefore, when the indictment in a prosecution for adultery (§ 5317) shows that defendant was married at the time the prosecution was commenced, it should allege that it was commenced on the complaint of the husband or wife: *Ibid.*

It is not necessary to negative an exception made in a criminal statute, unless it adds a qualification to bring the case within it which but for the qualification would be without it: *Ibid.*

It is not necessary in case of statutory exceptions for the indictment to show that the accused does not come within the provisions of the exception: *State v. Conable*, 81–60.

5691. Immaterial matters.

Defects not tending to prejudice the substantial rights of the defendant upon the merits will not be considered: *State v. Casford*, 76–330.

Where the indictment will be sufficient without the defective averment contained therein, such averment may be disregarded. So *held* where there was an allegation of a possible date and in connection therewith the statement of an impossible date, due to a clerical error: *State v. Brooks*, 52 N. W. R., 240.

5699. Principal and accessory.

Two persons may be jointly indicted for an offense which, from its nature, can be committed but by one; and under such indictment one who merely aided and abetted such offense can be convicted: *State v. Munchrath*, 78–268.

Therefore under an indictment charging several defendants with murder, *held*, that one of them might be convicted thereof upon proof of conspiracy in which he participated, carried out by others of the defendants, although he himself was not present when the crime was committed: *Ibid.*

Where it appeared that defendant charged with murder had participated in a conspiracy for the whipping of deceased under such circumstances that it would have been unlawful, and that in the prosecution of such conspiracy deceased was shot by one of the conspirators, *held*, that defendant was properly convicted of manslaughter, he not being free from liability for the shooting by reason of the fact that the injury done was greater than that intended by the conspirators: *Ibid.*

Whether an accessory after the fact is punishable as principal, *quære*. But it is erroneous to charge the jury in a prosecution for larceny that if the defendant planned, aided or abetted the commission of the larceny, though not present at its commission, then he is equally guilty with the person who committed the larceny; or if after the commission of such act defendant aided, abetted or assisted the person committing the larceny to the disposition of the property secured thereby, then he will be guilty, inasmuch as the assisting in disposing of the stolen property without the knowledge that it is stolen will not render the person guilty either as principal or as accessory: *State v. Empey*, 79–460.

Where an indictment charged the defendant with the crime of murder as principal and the evidence showed that he was guilty as accessory before the fact, *held*, that there was no variance between the indictment and the testimony: *State v. Baldwin*, 79–714.

CHAPTER 18.

ARRAIGNMENT OF THE DEFENDANT.

5712. How soon; waived.

In a prosecution for larceny where the jury was called, impaneled and sworn and the opening arguments made for state before there had been an arraignment or plea entered, and defendant was afterwards arraigned against his objection and asked time to plead, which was granted and the jury discharged, *held*, that the objection to arraignment was not a waiver of the same by defendant: *State v. Pierce* 77–245.

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5713. Personal presence of defendant.

Where it does not appear but that the real party charged was present at the trial and identified, the proceeding must be regarded as a trial as to him, although the name of the defendant in the indictment is that of another person: *State v. Bowman*, 78–519.

The failure of the record to show affirmatively that the arraignment was made or waived and plea put in is a mere irregularity not prejudicial to defendant where he is tried on a plea of not guilty: *Ibid.*

Where it is claimed that defendant was arraigned and a plea of not guilty was entered for him in his absence and the showing on the record was conflicting, *held*, that the supreme court would not interfere with the action of the lower court, the fact in dispute having been doubtless within its knowledge: *State v. Andrews*, 50 N. W. R., 549.

Counsel may enter the plea of not guilty for defendant in his absence: *Ibid.*

CHAPTER 19.

SETTING ASIDE THE INDICTMENT.

5722. Grounds; selection of jury.

Substantial compliance with the provisions of the law in regard to the selection of jurors is required, and the uncertainty as to what may be regarded as a substantial deviation makes it safest and best in principle to conform, as far as may be, to the literal provisions of the statute: *State v. Beckey*, 79–868.

CHAPTER 21.

THE MODE OF TRIAL.

5734. Issues of fact.

A trial is a determination of issues of law or fact arising on a demurrer or plea; therefore, *held*, that a rendition by a justice of the peace in a criminal case of judgment on a plea of guilty was not a trial in such sense as to entitle him to a trial fee: *Mathews v. Clayton County*, 79–510.

5735. Trial by jury.

Where the defendant in a criminal prosecution, with the consent of the court and of the state, waives his right to trial by a jury of twelve men and agrees that the verdict of eleven jurors shall "be as valid and binding as though rendered by a full jury," he will be bound by such verdict: *State v. Grossheim*, 79–75.

It is not improper to hear arguments on legal propositions with reference to the question involved in a prosecution after the close of the testimony in the absence of the jury: *State v. Row*, 81–183.

CHAPTER 22.

DEMURRER.

5737. Ground.

The parties cannot, for the purpose of the determination of the sufficiency of an indictment on demurrer, add to or explain the indictment by the contents of a paper forming no part of it, and which is not provided for by law. Therefore, *held*, that a writing by the county attorney, conceding that certain threats charged in the indictment were not made in a certain manner, could not be considered on appeal in determining whether the ruling of the court on the demurrer was correct: *State v. Brownlee*, 51 N. W. R., 25.

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CHAPTER 23.

PLEAS TO THE INDICTMENT.

5749. Conviction or acquittal a bar.

In a criminal prosecution where the jury was called, impaneled and sworn, and the opening arguments made before there had been an arraignment or plea, and the defendant was afterwards arraigned against his objection, and asked time to plead, which was granted and the jury discharged, *held*, that defendant had not been previously put in jeopardy by the proceedings: *State v. Pierce*, 77-245.

CHAPTER 24.

CHANGE OF VENUE IN CRIMINAL CASES.

5759. Court's discretion.

The application for a change is addressed to the sound discretion of the court, and the decision thereof will not be disturbed unless it be clearly shown that this discretion has been abused: *State v. Cadwell*, 79-478; *State v. Woodard*, 50 N. W. R., 885.

Where defendant was found guilty of murder, and the verdict was set aside on the ground that one of the jurors was an alien, and a motion by defendant for a change of venue on the ground of prejudice in the county where he had once been tried was overruled, *held*, that there was no abuse of discretion in overruling the motion, as the fact that defendant had once been tried and convicted in the county would not of itself be sufficient to justify a change of venue, and it was shown by counter-affidavits on behalf of the state that if there had been prejudice on the part of the public it had died out before the first trial: *State v. Kennedy*, 77-208.

And a motion to have the persons who executed the counter-affidavits brought into court and orally examined, *held* properly overruled, as there was nothing to indicate that the counter-affidavits were not made in good faith: *Ibid.*

Where an application for a change of venue is made on account of the alleged prejudice of the judge, it is the duty of the court to grant or deny the change, not according to his preferences or as to the belief of the applicant for the change, but as to the fact of prejudice as it appears to him, and his ruling will not be disturbed upon appeal unless it appears that there has been an abuse of discretion: *State v. Billings*, 77-417.

But where an application for a change was supported by affidavits of forty or fifty persons showing strong excitement and prejudice among the people, opposed to which were the affidavits of almost eight hundred others, which did not deny the excitement and prejudice, but claimed that it was not so great as to prevent a fair and impartial trial, *held*, that to have granted a change would have been according to the general practice in such cases and the refusal of the court to do so was an abuse of discretion: *Ibid.*

Where more than two months after the finding of an indictment and on the eleventh day of the next term of court, defendant filed an application for a change of venue, verified by himself and three other persons, and the state filed counter-affidavits of eleven persons, and defendant asked for more time in which to file additional affidavits, *held*, that as there was no excuse for defendant's delay in making the application, there was no abuse of discretion in denying the request for additional time and denying the request for a change of venue: *State v. Adams*, 81-595.

In a prosecution for libelous publication with reference to a candidate for congress, change of venue being asked on the ground that such candidate had been recently elected by a large majority, receiving a majority of the votes in the county, *held*, that it appearing that there was no undue excitement at such election the change was properly denied in the discretion of the court: *State v. Conable*, 81-60.

The county in which the cause is tried is liable, primarily, for the costs and charges, such county having the right under § 5121 to recover the amount thereof from the county in which the offense was committed: *Lockhart v. Montgomery County*, 76-79.

5770. Appearance in county to which transferred; witnesses bound over.

The substitution in this section of "cognizance" for "recognizance," as the section stood in the Revision of 1860, evidently occurred by mistake, and the section should be construed to authorize courts and judges to require recognizances: *Comfort v. Kittle*, 81-179.

The proceeding is summary, no provision being made for notice or hearing, and the order may be made at chambers without notice: *Ibid.*

This section does not authorize an order requiring the witness to give security for his appearance and that he be imprisoned unless such security be given: *Ibid.*

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5771. Costs in case of change of venue.

This section was designed to relieve the county to which a criminal cause should be transferred from liability for costs of its prosecution and to require their payment by the county in which the offense charged was committed and from which the case was transferred. It was not designed to increase the items of taxable costs and does not include the expense of printing abstracts: *State v. Billings*, 81–566.

But where abstracts are prepared and printed by the defendants in criminal cases, neither the county nor the state is liable for such costs: *Ibid.*

CHAPTER 25.

THE FORMATION OF TRIAL JURY.

5781. Talesmen.

Where a motion for a new trial, on the ground that special *venires* were improperly issued, was supported by affidavit of an attorney for defendant, *held*, that the facts in regard to the impaneling of the jury should have been made a part of the record by a bill of exceptions, and in the absence of such showing it would be presumed that the jury was properly impaneled: *State v. Kennedy*, 77–208.

CHAPTER 26.

CHALLENGING THE JURY.

5790. For cause.

Under the existing statute no opinion which a juror entertains disqualifies him unless it would prevent him from rendering a true verdict upon the evidence submitted on the trial: *State v. Munchrath*, 78–268.

A person otherwise unobjectionable is not disqualified for acting as a juror on the trial of one defendant if he has formed an opinion as to his guilt or innocence from having read what is claimed to be a full report of the evidence given on the trial of another defendant for the same offense: *Ibid.*

A person may form an opinion from reading a newspaper account of an alleged crime, or from hearing others speak of it, and not be disqualified from acting as a juror, provided the opinion so formed is not of a character to interfere with the rendering of a true verdict on the evidence submitted on the trial: *Ibid.*

It is the duty of the court, and not of the juror, to determine whether his opinion disqualifies him to act as a juror. The court should decide as to the fact of qualification from a consideration of the juror's examination as a whole, and of such other evidence and circumstances as may be relevant and which tend to aid it in reaching a just conclusion: *Ibid.*

The party challenging must distinctly specify which of the several facts disclosed by the juror's answers he relies upon as a cause of challenge; and where the defendant challenged a juror "on his answers for cause," *held*, that the ground of challenge was not sufficiently specified: *Ibid.*

In a particular case, *held*, that there was no error in overruling the challenges to two jurors for cause: *State v. King*, 81–587.

Error in overruling a challenge to a juror is error without prejudice, if the juror does not sit, and the defendant does not exhaust all his peremptory challenges: *State v. Brownlee*, 51 N. W. R., 25.

5798. Number of challenges.

Where the defendant in a criminal prosecution had a right to twenty peremptory challenges at the time the crime was committed and the law was subsequently amended so as to give the defendant but ten challenges, but the prosecution was commenced before the amendatory act took affect, *held*, that the amendment affected no vested right, but merely pertained to the remedy, and was applicable after it took effect, no matter when the proceeding was commenced: *State v. Shreves*, 81–615.

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CHAPTER 27.

THE TRIAL OF AN ISSUE OF FACT IN AN INDICTMENT.

5804. Continuances.

In a prosecution for murder, where defendant asked for a continuance until the next term for the purpose of obtaining testimony and the application was overruled, but a continuance afterwards granted to a later day in the term, at which time defendant was tried, convicted and sentenced to death, and where the record showed that certain depositions had been taken in another state and mailed to the place of the trial but had failed to arrive, *held*, that the court should have continued the case upon its own motion until a subsequent term that the defendant might have the benefit of the delayed testimony: *State v. Foster*, 79-726.

In general, see notes to § 3961.

5805. Order of trial.

In a proper case the court may permit an attorney to assist in the prosecution of an indictment without regard to the fees charged, even though he may not be employed by the supervisors and is not a deputy of the county attorney: *State v. Shinner*, 76-147.

A prosecuting witness or party complaining may employ additional counsel, with the approval of the court and county attorney, to assist in the prosecution of a criminal case: *State v. Shreves*, 81-615.

In a criminal prosecution where it was alleged that the county attorney in his opening statement to the jury was guilty of misconduct in stating that certain evidence would be introduced by the state and no such evidence was offered, *held*, that an examination of the attorney's address in connection with the evidence failed to show a departure from proper methods sufficient to justify the granting of a new trial: *Ibid.*

Where after the opening argument for the prosecution defendant asked to have the cause submitted without further argument, waiving argument for the defense, *held*, that it was not error to allow another attorney to further address the jury on behalf of the prosecution: *State v. Row*, 81-138.

An argument of the prosecuting attorney in closing, *held* not to have introduced into the case any facts as to which there was no evidence or to have been otherwise unusual or prejudicial: *Ibid.*

In the argument of a cause to a jury it is proper for counsel to draw inferences from the evidence and comment upon the conduct of the parties, and a misstatement of the law in argument will not be regarded as prejudicial misconduct of counsel: *State v. Toombs*, 79-741.

Under peculiar circumstances, *held*, that the testimony of witnesses who were not before the grand jury was admissible as rebutting evidence, and therefore no notice was necessary: *State v. Watson*, 81-380.

As to instructions, see notes to § 5825.

5806. Evidence for state; names of witnesses indorsed; notice.

An objection that the name of the witness is not indorsed on the indictment may be a ground of a motion to set aside the indictment, but it is no reason for excluding the evidence where the witness was examined before the grand jury and the minutes of his evidence were returned: *State v. Story*, 76-262.

A witness may be called in rebuttal without having been examined before the grand jury or notice given to the opposite party, even though the matter as to which he testifies might also have been proper in support of the state's case in the first instance: *State v. Munchrath*, 78-268.

Under particular circumstances, *held*, that the testimony of witnesses who were not before the grand jury was admissible as rebutting evidence, and therefore no notice was necessary: *State v. Watson*, 81-380.

The minutes are sufficiently filed when they are left with the clerk of the court, although not indorsed by him nor entered in the appearance docket: *State v. Craig*, 78-637.

Failure to indorse the names of the witnesses upon the indictment where the minutes of their testimony are returned is a ground for assailing the indictment but not a ground of objection to the introduction of the witness: *Ibid.*

Where T. B. Ross was examined as a witness but the name on the indictment for illegal sale of liquor was Burr Ross, and one count in the indictment charged sales to Burr Ross, but such count was afterwards withdrawn from the jury, *held*, that any error in the receipt of the testimony of such witness relating to that count of the indictment was cured: *Ibid.*

The notice provided for by this statute is designed to inform the accused of the evidence which the witness described will give on the trial, that the accused may investigate and prepare to meet it. A notice to the effect that the state will prove by the witness that the defendant is guilty as charged does not meet the statutory requirement. It should state the matter to which the witness is expected to testify, and not its legal effect: *State v. Kreder*, 52 N. W. R., 658.

When notice has been properly given, the witness may be examined not only as to the matter set forth in the notice but as to other material matters in the case: *State v. Craig*, 78-637.

Where evidence of witnesses whose names are not indorsed on the indictment is withdrawn from the jury, the fact that they were improperly allowed to testify will not be ground for reversal: *State v. Cummins*, 76-133.

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5812. Confession of defendant.

Voluntary testimony given before the grand jury by defendant after being advised that he is under no obligation to testify may be proven: *State v. Carroll*, 51 N. W. R., 1159.

5813. Reasonable doubt.

What constitutes: The doubt that acquits is a reasonable doubt that exists in the mind after all the testimony is heard and considered. It is not necessary that the jury be instructed that the evidence must remove reasonable doubt. The existence of reasonable doubt is not to be presupposed: *State v. Perigo*, 80–37.

Instructions: Where a paragraph of a charge to the jury fully and explicitly stated the degree of proof required to convict, and the following paragraphs failed to instruct that the jury must find beyond a reasonable doubt, *held* that, taking the instructions together, no doubt could have existed in the minds of the jury that their finding must be beyond a reasonable doubt: *State v. Rainsbarger*, 79–746.

Where the question of reasonable doubt was fully explained in the charge, *held*, that it was unnecessary to refer to it in each instruction: *State v. Murdy*, 81–603.

Burden of proof: The burden of proving want of chastity in a prosecution for seduction is with the defendant, and it is proper to instruct the jury that, unless such defense is made out by a preponderance of the evidence, they should find that prosecutrix was chaste: *State v. Hemm*, 82–609.

The burden of proof is on the prosecution to show that the killing was not excusable by reason of self-defense where there is evidence tending to show that defendant acted in self-defense: *State v. Donahoe*, 78–486.

Alibi: An instruction that the burden of proof is on defendant to establish by preponderance of evidence his defense of *alibi*, but that the burden of proof is on the state to establish beyond a reasonable doubt that the crime charged was in fact committed, and that if the entire evidence upon the whole case raises a reasonable doubt as to defendant's guilt, then the jury should acquit *held* not objectionable: *State v. Van Winkle*, 80–15. And see *State v. Hatfield*, 75–592.

The rule in this state is that the burden is upon the defendant to prove a defense of *alibi* by a preponderance of the evidence. This burden is upon the accused because the knowledge of the truth of it and of the means of proving it is peculiarly with him, and unless proven it is entitled to no consideration. It is as though no evidence had been offered upon the subject. Defendant must establish the *alibi* by a preponderance of the evidence, before he is entitled to have it considered, even as the basis of a reasonable doubt: *State v. Beasley*, 50 N. W. R., 570.

All the evidence in the case may be considered in determining the truth of the defense of *alibi*: *State v. Standley*, 76–215.

It is not necessary to acquittal that an *alibi* should be clearly established; it is sufficient if it is established by a preponderance of evidence: *State v. Sipult*, 81–40.

Character: Where a witness testifies as to the good character of defendant, he cannot properly be cross-examined as to defendant's having been engaged in a particular quarrel: *State v. McGee*, 81–17.

But *held*, that in the particular case the error was without prejudice in view of the fact that the answers were in every instance favorable to defendant: *Ibid.*

5814. Reasonable doubt as to degree.

As to finding defendant guilty of a lower degree of the crime with which he is charged, or of an included crime, see notes to §§ 5850, 5851.

5819. Separation of jury before final submission.

This provision plainly implies that no separation is permissible after the cause is submitted to the jury, unless by consent: *State v. Fertig*, 50 N. W. R., 545.

5825. Instructions.

Duty to instruct: It is the duty of the court to explain to the jury the offense with which defendant is charged, what acts constitute it, and explain or define the words used by the statute in prescribing the offense. More than this is not necessary by way of definition: *State v. Clark*, 78–492.

Where the instructions given are not erroneous a party cannot complain of a failure to instruct more specifically where more specific instructions have not been asked: *State v. Illsley*, 81–49; *State v. Watson*, 81–380.

Where complaint was made that the court had not in a prosecution for assault with intent to commit murder explained the doctrine of self-defense, *held* that, if counsel thought that such instruction ought to have been given, he should have asked it and could not complain on account of its not being given: *State v. Woodard*, 50 N. W. R., 885.

Where the evidence tends to show that defendant charged with murder acted in self-defense, the jury should be fully charged in reference to that subject: *State v. Donahoe*, 78–486.

Instructions in a particular case *held* to properly cover the ground as to manslaughter and self-defense: *State v. Perigo*, 80–37.

Additional, in writing: Where a jury after deliberating requested additional instructions, which were given orally by the court and taken down in short-hand by the reporter and afterwards written out and given to the jury, but the jury had previously, upon consideration of the oral instructions, agreed upon a verdict, and when the written instruc-

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tions were received and read by vote adhered to the verdict as found, *held*, that the giving of the oral instructions, though they were subsequently reduced to writing, was error: *State v. Harding*, 81–599.

As to higher degree: Error committed in instructions with reference to a higher degree of a crime than that for which defendant is convicted will not necessarily be error without prejudice. Thus where in a prosecution for murder the court erred in instructing the jury as to whether certain facts would constitute a provocation reducing the crime to manslaughter, *held*, that such error was not without prejudice although the conviction was for manslaughter: *State v. Adams*, 78–292.

As to alibi: The jury may be properly instructed to consider the evidence upon the defense of *alibi*, together with all the other evidence, in determining defendant's guilt: *State v. Standley*, 76–215.

Further as to *alibi*, see notes to § 5813.

As to facts: It is error to assume that there have been acts and declarations and direct the jury as to the effect to be given thereto when the evidence is conflicting as to the facts: *State v. Potts*, 78–656.

It is not erroneous to assume in an instruction the existence of facts about which there is no controversy: *State v. Huff*, 76–200.

Upon statute: Where defendants were indicted for receiving deposits while insolvent, *held*, that an instruction incorporating the substance of the statute defining such offense, which described also the acts of being accessory to and permitting or conniving at the receipt of such deposits, was not erroneous, although no issue as to such acts was in the case: *State v. Cadwell*, 79–432.

Construction: All the instructions in the case are to be construed together in determining the correctness of one of them: *State v. Standley*, 76–215; *State v. Shreves*, 81–615.

Objections to separate instructions which are groundless when the whole charge is taken together will not be considered: *State v. Murdy*, 81–603.

An erroneous instruction will not be ground for reversal when the error is cured by other instructions given in the case: *State v. Pugsley*, 75–743.

An instruction will not receive that construction which the professional mind might assume the court intended, but it must be given that meaning which the language used would reasonably convey to the jury: *State v. Billings*, 77–417.

Evidence which has been improperly admitted may be withdrawn by instruction of the court from the consideration of the jury, so as to prevent the error being prejudicial: *State v. Cummins*, 76–133.

Presumption: Where the evidence is not before the supreme court, it will be presumed in favor of the instruction that it was adapted to the evidence given on the trial and was correct: *State v. Wyatt*, 76–828.

In general: As to instructions in general, in both civil and criminal cases, see notes to § 3996.

5827. Deliberation of jury; in charge of officer.

These provisions are not merely directory, but are absolute requirements. No separation is admissible after the case is submitted to the jury, unless by consent; and where without consent of the parties the jury reduced their verdict to writing, and it was signed by the foreman and delivered to an officer who had the jury in charge, and the jury then separated, supposing in good faith that they were authorized to return a sealed verdict, *held*, that a new trial should be granted: *State v. Fertig*, 50 N. W. R., 545.

CHAPTER 29.

THE VERDICT.

5845. Jurors present.

Separation of the jury after agreeing on a verdict and returning it to the court, under a misapprehension that they were authorized to return a sealed verdict, *held* error entitling the defendant to a new trial: *State v. Fertig*, 50 N. W. R., 545.

5847. Verdict rendered.

Where counsel for defendant moves the court, at the close of the evidence for prosecution, to direct a verdict for defendant, he cannot require that the jury be sent out while the motion is being heard. He must take the chances that the effect of overruling may have on the jury: *State v. Huff*, 76–200.

The separation of the jury without consent will entitle defendant to a new trial: *State v. Fertig*, 50 N. W. R., 545.

5849. Form.

Where the verdict was as follows: "We, the jury in the case of *State of Iowa v. Harry Lee*, the defendant guilty as charged in the indictment," *held*, that the omission of the word find was not fatal, and that the verdict was sufficient to sustain a conviction: *State v. Lee*, 80–75.

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5850. Finding an offense of different degree.

It is reversible error to put defendant upon trial for an offense of a higher degree than that with which he is charged, even though the indictment sufficiently charges the degree of the offense of which he is convicted: *State v. Andrews*, 50 N. W. R., 549.

Where an indictment charges murder in the first degree, the state may waive a trial for that degree and claim a conviction for any lesser degree embraced in the charge: *State v. Baldwin*, 79–714.

It has never been held in this state that where a party has been indicted for murder in the first degree the court should instruct the jury that defendant cannot be convicted of the degree of the crime charged, it appearing that homicide was committed by defendant: *State v. Adams*, 78–292.

5851. Included offenses.

Where the evidence shows that the defendant is either guilty of the crime charged or not guilty, it is not error to omit to charge the jury as to lower grades of the crime: *State v. Sterrett*, 80–609.

It is not error to fail to instruct the jury as to an included crime of which there is no evidence: *State v. Casford*, 76–330.

Where defendant was on trial for murder and the killing of deceased was clearly proven, *held*, that it was not error to fail to instruct as to possible crimes lower than manslaughter: *State v. Munchrath*, 78–268.

Where the fact that the homicide and its commission by the defendant is undisputed, and the only question is whether it is excusable or criminal, and, if criminal, then as to the degree of the crime, the offense of assault with intent to commit the crime or of a simple assault is not involved: *State v. Row*, 81–138.

There is no necessity for stating in the instructions the punishment provided for lower degrees of the crime for which defendant is put on trial or for other crimes included therein: *State v. Peffers*, 80–580.

Where there is no question but that defendant inflicted the mortal wound, and the only question is whether he did so unlawfully, it is not necessary to instruct the jury as to assault to inflict great bodily injury, assault and battery, and other offenses less than manslaughter: *State v. Perigo*, 80–37.

An instruction to the jury that if they failed to find that the shot was fired by the defendant wilfully, deliberately and premeditatedly, they would find him guilty of murder in the second degree, *held* not prejudicial as ignoring the fact that he might have been guilty of manslaughter only, when taken in connection with a preceding instruction in which the facts necessary to constitute the crime of murder in the first degree were specified, and one following which directed the jury that in case they failed to find the defendant guilty of murder in either the first or second degree they might then determine whether or not he was guilty of manslaughter: *State v. Murdy*, 81–603.

In a prosecution for assault with intent to commit murder, it is proper for the court to explain the crimes of murder and manslaughter: *State v. Woodard*, 50 N. W. R., 885.

5855. Jury polled.

Where a jury, without authority, rendered a sealed verdict and separated, and after that they were called together again for the purpose of being polled and thus assented to the verdict, *held*, that this did not cure the error *State v. Fertig*, 50 N. W. R., 545.

CHAPTER 30.

BILLS OF EXCEPTION.

5864. As to what.

Where a motion for a new trial on the ground that special *venires* were improperly issued was supported by affidavit of an attorney for defendant, *held*, that the facts complained of should have been made a part of the record by a bill of exceptions, and in the absence of such showing it would be presumed that the jury was properly impaneled: *State v. Kennedy*, 77–208.

And see notes to § 5923.

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CHAPTER 31.

NEW TRIALS.

5874. Causes for.

Misconduct of jury: Where a jury, without authority but under a misapprehension as to their right to do so, sealed up their verdict and separated, *held*, that there was such error as to entitle the defendant to a new trial without any showing of prejudice: *State v. Fertig*, 50 N. W. R., 545.

The drinking of intoxicating liquors by a juror during an adjournment of court will not authorize the setting aside of the verdict: *State v. Kennedy*, 77–208.

Where it appeared that a juror while the case was on trial had expressed to an outsider his views of the case, *held*, that while such conduct was reprehensible it appeared that it could not have been prejudicial and therefore was not a ground for a new trial: *State v. Craig*, 78–637.

Where the motion for a new trial on the ground that a juror was intoxicated on the trial was supported by an affidavit of defendant and controverted by that of the juror, *held*, that the action of the lower court in refusing to grant a new trial would not be disturbed: *State v. Lee*, 80–75.

Under particular facts, *held*, that conduct of a juror in deriving knowledge as to the particular matter from circumstances not in evidence was not prejudicial and therefore was not ground for reversal: *State v. Beasley*, 50 N. W. R., 570.

Verdict not sustained: It is the duty of the court to grant a new trial whenever in its judgment the verdict is not sustained by the evidence: *State v. Billings*, 81–99.

And where the judge of a trial court on passing upon a motion for new trial on this ground expressed it as his opinion that the verdict was not supported by the evidence, *held*, that such expression of opinion appearing on the record would be considered by the supreme court, although the judge overruled the motion for a new trial, and the case was reversed on the ground that such new trial should have been granted: *Ibid.*

Misconduct of counsel: Where it was claimed that the county attorney had referred to the fact that the defendant had not been introduced as a witness in his own behalf in violation of § 4886, but the record failed to show that fact, *held*, that as the court below refused a new trial upon that ground, it would be presumed there was no such misconduct: *State v. Whitmer*, 77–558.

A judgment in a criminal case will not be reversed because of certain language used by the counsel for the state in the closing argument, where there is a conflict in the record as to whether the language complained of was used and when no objection was made to it until after the verdict: *State v. Shreves*, 81–615.

A misstatement of law by counsel in argument cannot be regarded as prejudicial misconduct, and, upon appeal, will not be ground for reversal: *State v. Toombs*, 79–741.

Where the trial judge absented himself during the argument to the jury, leaving an attorney to preside in his place, *held*, that complaints with reference to misconduct of prosecuting attorney during such time in interrupting defendant's attorney and causing disorder in the court room were not such as to entitle defendant to a new trial: *State v. Griffin*, 79–568.

In a particular case, *held*, that there was not misconduct of counsel sufficient to require a reversal in referring to the effect of the evidence upon his own mind: *State v. Beasley*, 50 N. W. R., 570.

As to misconduct of counsel in opening statement to the jury, see notes to § 5805.

Newly-discovered evidence: The statute makes no provision for a new trial on the ground of newly-discovered evidence: *State v. Lee*, 80–75; *State v. Watson*, 81–380; *State v. Whitmer*, 77–558.

Under the facts of a particular case (without referring to the question whether newly-discovered evidence is ground for new trial in a criminal case), *held*, that the evidence was cumulative, and that the party had not shown such diligence as to entitle him to a new trial on that ground: *State v. Foley*, 81–86.

Newly-discovered evidence, cumulative and relating to collateral matters, is not ground for new trial: *State v. Potts*, 49 N. W. R., 845.

Showing of newly-discovered evidence in a particular case, *held* not sufficient: *State v. Gnagy*, 50 N. W. R., 882.

Presumption; showing: It is not competent on appeal to overcome the presumption which must be indulged in favor of the proceedings in the trial court in regard to matters which occurred in the presence of the court, by means of an affidavit attached to the motion for new trial: *State v. Kennedy*, 77–208.

Where there is no showing in the record as to the matter complained of as a ground for new trial except affidavits and counter-affidavits, it will not be presumed that the action of the court in refusing a new trial was erroneous. In the absence of a bill of exceptions it will be presumed that there was other showing made to the court: *State v. Woodard*, 50 N. W. R., 885.

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CHAPTER 32.

ARREST OF JUDGMENT.

5876. Grounds for.

Where an information is insufficient because the facts constituting the offense are not stated, the defect may be taken advantage of after the verdict by a motion in arrest of judgment: *State v. Butcher*, 79–110.

CHAPTER 33.

JUDGMENT.

5881. Conviction; time for.

It will not be presumed that sentence was pronounced without allowing the time to elapse as here required: *State v. Turney*, 77–269.

5892. Rendition of judgment.

Where discretion is given to the court as to the amount of punishment to be imposed, it may take cognizance of facts and circumstances which the record does not and cannot disclose in fixing the punishment, and thereafter, on appeal, the action of the court will not be interfered with unless an abuse of discretion is shown: *State v. Maloney*, 79–418.

Without regard to whether it is proper for the trial judge to advise himself as to the matters not disclosed in the evidence as an aid in fixing the punishment, it is *held* that if such action is unwarranted, it is not a ground for a new trial. Such action might be a ground for an application to reduce the punishment as excessive: *State v. Huff*, 76–200.

The failure of the court to specify in the judgment the length of imprisonment for fine will not render the judgment void so that defendant may be released on *habeas corpus* before the expiration of the length of time which might be specified in the sentence according to statute, but will be an error to be corrected on appeal: *Elsner v. Shrigley*, 80–30.

The judgment does not fix the particular penitentiary in which the prisoner shall be confined. That matter may be regulated, under statutory provisions, by the executive council: *O'Brien v. Barr*, 49 N. W. R., 68.

5894. Imprisonment for fine.

Although the judgment provides for issuance of special execution and a general execution for the purpose of satisfying the fine, and then provides that defendant shall be imprisoned until the fine is paid, the imprisonment need not be postponed until it is ascertained whether or not the fine is satisfied by execution, but defendant may be imprisoned at once on failure to pay: *Elsner v. Shrigley*, 80–30.

5896. Allowance of bail for appeal.

Before the amendment of section 4107 of the Code, a person convicted of murder in the second degree was entitled to be admitted to bail, but by the provision of the amendment a person convicted of murder in either degree cannot be admitted to bail: *Baldwin v. Westenhaver*, 75–547.

CHAPTER 34.

EXECUTION.

5898. Commitment of defendant.

Where the judgment is that defendant be fined and committed in default of payment, and certified copies of the judgment entries are delivered to the sheriff, such entries have the force and effect of, and confer the same authority as, warrants, and it is the duty of the sheriff to hold them until executed by arrest and commitment. Such warrants do not expire by lapse of time and no return is authorized until after commitment: *McKay v. Woodruff*, 77–413.

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5900. Delivery to keeper of jail.

Where a prisoner is committed to a state jail under sentence of a federal court, a certified copy of the entry should be furnished as provided for by this section, and the clerk is entitled to a fee therefor: *Van Duzee v. United States*, 48 Fed. R., 643.

CHAPTER 35.

APPEALS.

5907. When taken.

An appeal from an order taxing the costs of prosecution to the prosecuting witness is an appeal in a criminal proceeding, within the provisions of this section: *State v. Hodgson*, 79–462.

In a criminal case no appeal can be taken until after a judgment has been rendered. The fact of judgment is jurisdictional, and must affirmatively appear: *State v. Haworth*, 50 N. W. R., 676.

5908. How taken; notice.

Where it is not shown that appeal has been taken by serving notice, the court will decline to take jurisdiction of the case: *State v. Brooks*, 50 N. W. R., 48.

5910. Transcript; duty of clerk.

Although it is made the duty of the clerk to send up a transcript, yet where he fails to do so and the defendant takes no steps to secure the filing of a transcript, the state cannot upon the filing of such transcript have the appeal dismissed or the judgment affirmed, but the court must decide the appeal on its merits without, however, furnishing defendant a further opportunity to be heard, unless some showing or application therefor is made: *State v. McGlasson*, 52 N. W. R., 226.

5914. Defendant detained in custody; bail.

In no case can bail after conviction be allowed to a person convicted of murder in the second degree (§ 5488), and the district court can exercise no direction in the matter: *Baldwin v. Westenhaver*, 75–547.

5923. Decision of appeal.

As to questions arising in both civil and criminal cases, see notes to § 4424.

What will be ground of reversal: The violation of a purely technical right, the disregard of which does not affect the substantial rights of the parties, will not be ground for reversal on appeal: *State v. Row*, 81–138.

A mere clerical error, apparent upon the face of the indictment, may be corrected in the lower court, and will not be a ground for reversal: *State v. Brooks*, 52 N. W. R., 240.

The rule that the supreme court is to examine the record, and, without regard to technical errors or defects, render such judgment as the law demands, is applicable on an appeal by the state as well as on an appeal by the defendant: *State v. Beckey*, 79–368.

Error without prejudice: A judgment or verdict will not be reversed because of an erroneous or inaccurate instruction when no possible prejudice could have resulted from it: *State v. Price*, 75–248.

The conviction will not be reversed for failure of the record to show arraignment and plea where it appears that defendant was tried on the issue of not guilty: *State v. Bowman*, 78–519.

Where an instruction was such that it would permit a conviction upon proof that an act was committed which was not prohibited by law when done, *held* erroneous, and in the absence of evidence to the contrary it would be presumed that it was prejudicial: *State v. Jacobs*, 75–247.

Where an erroneous instruction is given, it will be ground of reversal, even though the evidence would have warranted the same result had a correct instruction been given. Under such circumstances an instruction cannot be deemed to have been without prejudice: *State v. Empey*, 79–460.

The erroneous admission of evidence for the state will not be considered to have been without prejudice, although there is other evidence in the case to the same effect: *State v. Kreder*, 52 N. W. R., 658.

What record must show: Where it does not appear that any appeal was taken from the judgment of the lower court, the appeal will be dismissed: *State v. Campbell*, 80–770; *State v. Evans*, 81–748.

Where there was a trial by jury and a verdict of guilty against defendant, and the record showed no error or irregularity prejudicial to defendant, but the clerk certified that the evidence offered before the grand jury was read to the trial jury and that no other evidence was offered by either party, *held* that, as it was no part of the duty of the clerk to make such certificate, it would not be consid-

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ered, and it would be presumed that defendant was convicted upon proper evidence; but even though the testimony taken before the grand jury was all the evidence introduced on the trial and no objection was made to such evidence, it would be presumed that defendant waived his right to be confronted by the witnesses against him: *State v. Turney*, 77–269.

Allegations in a motion in arrest of judgment and for a new trial will not be considered on appeal in the absence of anything in the record to establish them: *State v. Braniff*, 76–291.

Where a case is submitted on what purports to be a transcript of the record, but it is not certified nor authenticated, it will not be considered, but the judgment of the trial court will be affirmed: *State v. Ill*, 75–548.

Where it did not appear from a bill of exceptions or otherwise that the evidence taken on the trial was embodied in the appellant's abstract, *held*, that it devolved upon appellant to make such showing, and in its absence it would be presumed that the verdict was in accordance with the evidence and that there was no error in the instructions given: *State v. Moore*, 77–449.

Misconduct of counsel for the state in arguments to the jury cannot be shown to the supreme court on appeal by affidavits, but must appear by bill of exceptions or certificate of the court below: *State v. Clemons*, 78–123.

Where the grounds of appeal required a consideration of the evidence, and appellant's abstract was denied on the ground that there was no bill of exceptions making the evidence of record, and that it was not certified, and such denial was not controverted, *held*, that the judgment would not be disturbed: *State v. Kuhner*, 77–250.

Where neither the evidence nor the instructions are included in the transcript on the appeal of a criminal case, the court cannot determine whether there was error in the introduction of evidence and in the giving of instructions: *State v. Myers*, 80–573.

Where the abstract fails to show all the record in the case, it will not be reviewed upon appeal, although the certificate in the bill of exceptions may be in the abstract: *State v. Hogan*, 81–747.

Where the case is presented by a partial transcript, showing only the indictment and judgment, no errors being pointed out, the court cannot determine as to whether errors were committed on the trial or in the ruling on motion for new trial: *State v. Henderson*, 49 N. W. R., 842.

Without the evidence and instructions before it, the supreme court cannot pass upon the correctness of the court's rulings on a motion for new trial: *State v. Duckworth*, 50 N. W. R., 549.

In a particular case, *held*, that the records presented by the appellant showed no error: *State v. Daniels*, 76–87.

Presumption in favor of ruling below: Where the evidence is not before the supreme court, it will be presumed in favor of the instruction that it was adapted to the evidence given on the trial and was correct: *State v. Wyatt*, 76–828.

Where it does not appear that the court has before it the entire showing made on the motion for new trial, it will be presumed that there was such showing as to support the action of the court: *State v. Woodard*, 50 N. W. R., 885.

Where, in the course of a cross-examination, the court directed the counsel of defendant to treat the witness with respect, and it did not appear from the record that, so far as regards the mere words used, there was any disrespect shown to the witness, *held*, that it would be presumed that the court was justified in using the language it did as reproof to counsel: *State v. Hatfield*, 75–592.

Verdict against evidence: In criminal cases the supreme court will on appeal interfere more readily with the action of the lower court than it will in civil cases, and it will not support a verdict if it be against the clear weight of evidence: *State v. Wise*, 50 N. W. R., 59; *State v. Beasley*, 50 N. W. R., 570.

Where defendant was convicted of murder upon circumstantial evidence alone, *held*, that it was the province of the jury to determine the value and weight of the evidence, and, upon appeal, the court would not be justified in saying that their verdict should be set aside because it is unsupported by the evidence: *State v. Kennedy*, 77–208.

In a prosecution for assault with intent to commit murder, where defendant was convicted of an assault to commit great bodily injury, and there was a conflict in the evidence, but the court below overruled a motion for a new trial, *held*, that the judgment would not be reversed on the ground of insufficient evidence: *State v. Rainsbarger*, 79–746.

The judgment of the lower court should not be reversed on the ground that the verdict is not supported by the evidence, when there was a conflict in the evidence: *State v. Sterrett*, 80–609.

Where it was urged that the verdict was contrary to the evidence, and a reversal asked, and this claim was not controverted by the prosecution, the judgment was reversed: *State v. Hogan*, 50 N. W. R., 880.

Decision on the appeal: A judgment cannot be affirmed in a criminal case on motion: *State v. Bahne*, 79–472.

Neither can judgment be entered in the supreme court on the appeal bond in a criminal case where the bond is not before it: *Ibid.*

Where the clerk fails to send up a transcript and defendant takes no steps to present the case, but the state files such transcript and asks an affirmance, the supreme court will look into the merits of the case, but the defendant will not be entitled to a continuance or opportunity to be further heard, unless upon making a showing: *State v. McGlasson*, 52 N. W. R., 226.

Where the state files a written confession of errors committed on the trial of the case as presented in the assignment of errors, and asks for reversal and remanding of the case for new trial, such application will be granted and the case remanded: *State v. Bailey*, 50 N. W. R., 561.

In a prosecution for murder, where it appeared from the record that the court should have granted a continuance to a subsequent

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term in order that the defendant might have the benefit of certain testimony, an order was made, upon appeal, to that effect: *State v. Foster*, 79–726.

On the second appeal in a criminal case, the conviction being set aside on the ground that the evidence did not support a verdict of guilty, the supreme court expressed its view as to the sufficiency of such evidence in detail, as a guide to the prosecution in determining whether another trial should be had: *State v. Billings*, 81–99.

Where defendant was convicted of manslaughter, but the circumstances seemed such as to extenuate the crime, defendant being a mere boy, *held*, that the court would reduce the sentence to six months' imprisonment: *State v. Sterrett*, 80–609.

In determining the question of mitigation of punishment on appeal, considerations which do not appear of record cannot be taken into account: *State v. Turney*, 77–269.

Where a lower court has discretion as to the amount of fine to be imposed, and may properly take cognizance of facts and circumstances which the record does not and cannot disclose, in fixing the amount of such fine the supreme court will not on appeal interfere with the judgment, unless the discretion of the lower court is abused: *State v. Meloney*, 79–413.

5924. Appeal by state.

Upon an appeal by the state, without appearance of the defendant, the supreme court will only discuss and dispose of those questions which are proper to be determined as a precedent in other cases: *State v. Mackey*, 82–393.

In a particular case, *held*, that an instruction to the jury to find for defendant was erroneous as a matter of law, and the state might have such error corrected on appeal: *State v. Ward*, 75–637.

Section applied: *State v. Miller*, 81–72.

CHAPTER 87.

EVIDENCE.

5954. In general; as in civil cases.

Defendant as witness: The rule permitting a witness to be questioned on cross-examination to show crimes committed by him in order to impeach him applies to persons charged with crime when they appear themselves as witnesses: *State v. O'Brien*, 81–93.

Cross-examination: Where two witnesses, appearing to have had no communication with each other, gave at different places the same account of the transaction, *held*, that it was not proper for the opposite party to ask on cross-examination whether they had not had a private conversation with each other at a place named soon after the transaction; and *held*, that it was for the party to prove such fact by his own witnesses and not by cross-examination: *State v. Munchrath*, 78–268.

Testimony of co-defendant: Where a party jointly charged with defendant with a crime, having testified before the grand jury, claimed his privilege on being questioned as a witness, but afterwards submitted to examination, *held*, that by giving testimony before the grand jury he waived objection and might be required to testify fully; and further, that the defendant could not object to such testimony being admitted, the wrong, if any, being to witness and not to defendant: *State v. Van Winkle*, 80–15.

Declarations of co-defendant: Where two defendants are on trial declarations of one of them, although not made in the presence of the other, are admissible if material as to the one making them, the jury being instructed not to consider such evidence as against the other: *State v. Miller*, 81–72.

Conspiracy: Where it is claimed that the crime committed was in pursuance of a conspiracy, and it is sought to show as against defendant acts and declarations of other members of the conspiracy in furtherance of their designs, although made in the absence of defendant, the trial court is invested with a large discretion. In a particular case *held* that the showing was sufficient, *prima facie*, to justify the court in admitting the evidence: *State v. Row*, 81–138.

Evidence in a particular case, which tended to show that defendant participated in a conspiracy for the commission of the crime for which he was put on trial, although not present at the time of its commission, *held* to be properly admitted: *State v. Munchrath*, 78–268.

To justify the introduction of evidence of admissions by a co-conspirator, the proof must show *prima facie*, in the opinion of the judge, the existence of such conspiracy. The question of the sufficiency of such proof is one peculiarly for the determination of the trial court. The question of the actual existence of the conspiracy is one finally to be submitted to the jury, and the finding of the trial judge on that question is only a basis for the admission of evidence: *State v. McGee*, 81–17.

Certain statements made by one claimed to have been a co-conspirator with defendant which were not made in an attempt to further the object or plans of the conspiracy, *held* improperly admitted: *Ibid.*

Dying declarations: It is the province of the court to decide, in view of all the surrounding circumstances, upon the admissibil-

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ity of dying declarations: *State v. Baldwin*, 79–714.

Such declarations are restricted to the act of killing and to the circumstances immediately attending it, and must be made by the declarant under a solemn belief of impending death: *Ibid.*

And in a particular case, *held*, that declarations made by deceased when conscious of her danger and when she had given up all hope of recovery, though plainly referring to defendant, did not necessarily connect him with the commission of the crime, and were therefore improperly admitted: *Ibid.*

Dying declarations are statements of material facts concerning the cause and circumstances of a homicide, made by the victim under solemn belief of impending death. They are restricted to the act of killing, and to the circumstances immediately attending it, and forming a part of the *res gestæ*. When they relate to former and distinct transactions, and embrace facts or circumstances not immediately illustrating or connected with the declarant's death, they are inadmissible. They are admissible only as to those things to which the deceased would have been competent to testify. They must relate to facts and not to mere matters of opinion or belief: *State v. Perigo*, 80–87.

Therefore, *held*, that a statement by deceased as to the "hardship of being murdered on my farm," and as to threats that had been made against him by defendant in a prior transaction without date, were inadmissible: *Ibid.*

Under the particular facts, *held*, that a declaration was made under such belief of impending death that it was competent as a dying declaration: *State v. O'Brien*, 81–88.

As to a portion of such declaration to the effect that defendant was "the cause of his death," *held*, that while it was incompetent, yet, as the question did not call for such statement and no objection was offered to the answers given, the objection could not be considered on appeal: *Ibid.*

In a prosecution under an indictment for murder, where a statement made and signed by the deceased was offered in evidence, and it appeared that at the time it was made he believed he was mortally wounded and was going to die, and had been told by a physician that he could not recover, *held*, that the statement was competent as a dying declaration: *State v. Murdy*, 81–603.

And although the question of the admissibility of the statement was for the court alone, there was no impropriety in receiving evidence as to its competency in the presence of the jury: *Ibid.*

Confessions: Voluntary evidence given by the defendant before the grand jury after being advised that he is under no obligation to testify can be proved by members of the grand jury as a confession: *State v. Carroll*, 51 N. W. R., 1159.

In a particular case, *held*, that certain statements of this character were not in the nature of confessions but might be shown and their falsity proven: *Ibid.*

Where it appeared that defendant had left the state on the day on which search was being made for the goods which were stolen, *held*, that as there was evidence from which the jury might infer that he was or would be charged with the crime when he left, the testimony was proper to go the jury. Also *held*, that the fact that defendant denied his name and identity to the officer arresting him was admissible, there being some evidence that he was aware that he was charged with the crime: *State v. Van Winkle*, 80–15.

One who is present at the commission of the crime and runs away when the officer comes to make the arrest of the guilty party and fails to give any evidence to explain his presence and his flight may properly be deemed guilty: *State v. Boyer*, 79–330.

Character of defendant: In a prosecution for an assault to commit murder, where defendant was permitted to testify in his own behalf, and evidence was introduced to impeach his testimony, and the court instructed the jury that this evidence should only be regarded to the extent of determining the right and credit to be given defendant's testimony in his own behalf, *held*, that the application of the testimony was clearly restricted to defendant as a witness, and it was unnecessary to add to the instruction that such testimony should not be allowed to influence them against defendant as a party to the suit: *State v. Rainsbarger*, 79–741.

Character of deceased: Where deceased followed and accompanied a married woman in whose presence he was a few minutes afterwards killed by her husband, there being some question as to whether defendant acted in self-defense or not, *held*, that evidence of the general reputation of deceased as to being quarrelsome and inclined to fight was properly admitted, but that proof of particular acts, as that deceased had been convicted of assault and battery and of having been intoxicated, and of having used vulgar and profane language on the streets in the presence of ladies, was properly excluded: *State v. Peffers*, 80–580.

Distinct offense: Where an indictment for nuisance in obstructing a highway charges the offense as committed on a particular day, evidence of such obstruction on other days is admissible; the only relief defendant is entitled to in such case, if any, being to have the prosecution required to elect on motion on which act they will claim a conviction: *State v. Chicago, M. & St. P. R. Co.*, 77–442.

Credibility: It is not proper for a witness called by defendant in a criminal case to testify that he was subpœnaed by the state and had been discharged by its counsel: *State v. Row*, 81–138.

Detective: The motives and inducements under which a detective acts may be shown for the purpose of affecting his credibility: *State v. Carroll*, 51 N. W. R., 1159.

The court should not direct the jury to disregard the uncorroborated evidence of a detective. His credibility should be subjected to the same tests as those applied in case of any other witness: *Dickinson v. Bentley*, 80–482.

Impeachment: It is not objectionable in interrogating the members of the grand jury as witnesses as to what the evidence of a wit-

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ness before the grand jury was, for the purpose of thereby impeaching his evidence on the trial, that the counsel uses the minutes of the evidence taken before the grand jury in forming his questions: *State v. Row*, 81–188.

In a particular case, *held*, that statements of testimony given by witnesses on a former trial were properly admitted, the question as to whether there was any conflict between such statements and the testimony being for the jury: *State v. Van Winkle*, 80–15.

Proceedings of coroner's jury: In a prosecution for murder, proceedings before a coroner's jury, including the verdict of the jury, are not admissible in evidence on behalf of defendant under the claim that such evidence would show that defendant acted in self-defense: *Ibid.*

Corpus delicti: It is necessary in every case to prove that a crime has been committed, and under a charge of arson there can be no conviction unless it be satisfactorily proven that the building was maliciously, wilfully and feloniously burned by some one and that such burning was not accidental: *State v. Carroll*, 51 N. W. R., 1159.

Identity: Under facts in a particular case, *held*, that the evidence of the identity of defendant as the person who five years before had committed a larceny and been arrested therefor and escaped from the officers, was such as to sustain a conviction: *State v. Foster*, 81–131.

Intent: While the general presumption is that the person intends the result of his acts, there is no presumption that a man always intends to do the very thing he does do. Therefore, in a prosecution for an assault with intent to commit murder, *held*, that it would not be presumed that the injury thus inflicted was the injury intended: *State v. Postal*, 50 N. W. R., 207.

5957. Testimony of accomplice; corroboration.

In a particular case, *held*, that there was evidence which might properly be considered by the jury as corroborating the testimony of an accomplice and tending to connect defendant with the commission of the offense, the sufficiency of such evidence being for the jury: *State v. Van Winkle*, 80–15.

In a case of adultery the female may or may not be an accomplice. If consenting to the act, she too is guilty of adultery, and she is an accomplice; but if the act was against her will, she is free from guilt, and her evidence does not require corroboration under this section: *State v. Henderson*, 50 N. W. R., 758.

Parties do not become accomplices of a criminal by joining with him in the plan and assisting in its execution for the purpose of securing evidence against him by entrapping him before the commission of the crime which he intends to perpetrate: *State v. Brownlee*, 51 N. W. R., 25.

5958. Testimony of prosecutrix in rape or seduction; corroboration.

When required: It is only the connection of the accused with the offense that requires corroboration; and where the fact of the sexual intercourse is established by defendant's admissions, the evidence of the prosecutrix in addition to such admissions may be sufficient: *State v. Cassidy*, 52 N. W. R., 1.

This section has no application to a prosecution for adultery: *State v. Henderson*, 50 N. W. R., 758.

Rape: The corroboration required by this section, in prosecutions for rape, is not required in case of assault with intent to commit rape: *State v. Hatfield*, 75–592; *Rogers v. Winch*, 76–546; *State v. Grossheim*, 79–75.

The corroborating evidence required by this section is not required in a prosecution for forcible defilement: *State v. Montgomery*, 79–737.

Without determining whether the provisions of this section apply to prosecutions for incest or not, in a particular case, *held*, that it was for the jury to determine the sufficiency of the evidence introduced as corroborating: *State v. Moore*, 81–578.

What sufficient: An instruction in a particular case as to the requirement in regard to corroborating evidence, *held* not erroneous as directing the jury that the corroborating facts and circumstances were proved: *State v. Standley*, 76–215.

In an action for seduction, certain letters written by defendant to the prosecutrix, in connection with other facts showing intimacy between the parties, *held* to be properly admitted as corroborating evidence: *State v. Bell*, 79–117.

Certain evidence as to conduct of defendant, *held* to be sufficient corroboration of his connection with the commission of the crime charged: *State v. Watson*, 81–380.

Evidence in a prosecution for seduction that defendant visited prosecutrix as a suitor is sufficiently corroborative of her evidence to connect defendant with the offense: *State v. Gnagy*, 50 N. W. R., 882.

The fact that defendant was the suitor of prosecutrix for marriage, proven otherwise than by her own testimony, tends to corroborate her testimony that the seduction was effected by defendant, and therefore tends to connect him with the offense, within the requirements of this section: *State v. Smith*, 51 N. W. R., 24.

Testimony by a prosecutrix in an action for seduction that defendant on being informed by her that she was pregnant advised her to procure an abortion, *held* not to constitute sufficient corroborating evidence within the requirement of this section, as it depended upon the testimony of prosecutrix alone: *State v. Enke*, 51 N. W. R., 1146.

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CHAPTER 40.

BAIL UPON APPEAL TO THE SUPREME COURT, AFTER CONVICTION.

5985. When allowed.

It is doubtful whether defendant has the right to bail pending an appeal in a proceeding by *habeas corpus* to secure release from imprisonment for non-payment of fine: *Elsner v. Shrigley*, 80–80.

In a proceeding by *certiorari* to review the action of the district court in punishing for contempt, the district court cannot admit the defendant to bail: *State v. District Court*, 50 N. W. R., 677.

CHAPTER 41.

DEPOSIT OF MONEY INSTEAD OF BAIL.

5987. With whom, and effect.

Where the default of defendant is satisfactorily excused, the forfeiture as to the money deposited may be discharged, as in the case of the undertaking of bail, whether it has been deposited by the defendant or another: *Arquette v. Supervisors*, 75–191.

There is no provision permitting the payment of money to the sheriff, and the action of the sheriff in receiving such money would not only be unauthorized, but would not entitle the prisoner to release. Therefore, *held*, that in case of forfeiture of bail the state was not entitled to recover for the benefit of the school fund in an action against the sheriff: *State v. Farrell*, 49 N. W. R., 1038.

CHAPTER 43.

FORFEITURE OF THE UNDERTAKING OF BAIL, OR DEPOSIT OF MONEY.

5994. What constitutes.

An entry of default does not of itself operate as a transfer of the money to the school fund, but the right to discharge the forfeiture of the bail upon the appearance of the defendant and the satisfactory excuse of the default is absolute in the court during the term at which default was entered, and no right of action in favor of the school fund becomes vested until after the adjournment of such term: *Arquette v. Supervisors*, 75–191.

And where, upon entry of default, the money deposited as security for the appearance of defendant was turned over to the school fund by order of the board of supervisors, and the default and forfeiture were set aside at the next term of court, *held*, that plaintiff was entitled to a writ of *mandamus* for an order to refund the money: *Ibid.*

Even after entry of forfeiture on the bond action must be brought in court against the obligors to have the fact adjudicated or determined against them. Such proceeding and judgment do not set aside the forfeiture, but affirm or establish between the parties the fact of its existence. After such judgment is rendered the obligation is still a forfeiture which the governor may remit: *Harbin v. State*, 78–263.

This power of remission extends to the sureties as well as to the accused or principal in the bond: *Ibid.*

The fact that the forfeiture of bail appears to have been made after conviction of the defendant will not show that such forfeiture was erroneous. The court may at any time after conviction require the person convicted to appear and surrender himself or perform the judgment, and on failure to do so default may be entered on the bond: *State v. Baldwin*, 78–736.

The principal may be required to appear at any term subsequent to the term specified by the bond without notice to him or his sureties. His former appearance to answer the charge will not discharge the sureties: *Ibid.*

It will be presumed if the forfeiture was taken at a subsequent term that the case was continued by operation of law to the term when default was taken: *Ibid.*

The sureties cannot call in question the facts upon which the order of forfeiture is based; the order is conclusive as to them: *Ibid.*

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The surety in a bail bond is estopped by the recitals therein that an adjournment of the case had been ordered, and that the bond is executed under such order, from claiming that such bond was executed before the prisoner had been brought before the justice or the order for continuance made: *State v. Benzion*, 79–467.

By a bail bond a surety becomes bound that the accused shall obey the order of the court, and the fact that by consent of the accused continuances are had from time to time, without the knowledge or consent of the surety on the bond, will not release such surety from liability: *Ibid.*

By executing the bond the sureties assent that their liability shall be determined in a proceeding to which they are not otherwise made parties, and the record of the default of the principal in the bond will be deemed presumptive evidence that he had been indicted, although no indictment is shown: *State v. Coppock*, 79–482.

Where the bond obligates the accused to appear at the next term of the district court, parol evidence is not admissible to show that the magistrate binding defendant over advised sureties that the accused would not be required to appear until the second term: *Ibid.*

Evidence in a particular case, *held* sufficient to show forfeiture of a bail bond for failure of the defendant to appear at the time fixed: *State v. Burdick*, 51 N. W. R., 67.

5998. Surrender before judgment; remission.

The remission of the forfeiture is within the discretion of the court, and in a particular case, *held*, that the court was authorized to set aside the default and forfeiture at a subsequent term: *Arquette v. Supervisors*, 75–191.

CHAPTER 46.

JUDGMENTS FOR FINES, WHEN LIENS, AND HOW EXECUTIONS THEREON STAYED.

6007. On real estate.

A judgment of a justice of the peace for a fine for illegal sale of liquor does not become a lien, as provided in § 2419, until filed with the clerk of the district court: *State v. McCulloch*, 77–450.

CHAPTER 48.

THE DISMISSAL OF CRIMINAL ACTIONS BEFORE AND AFTER INDICTMENT FOR WANT OF PROSECUTION OR OTHERWISE.

6012. If not tried at second term.

Where the terms of court were so fixed that there was a September, a November and a January term, and the defendant was indicted at the September term, and the case was continued on his application, and he was then put on trial at the November term and the jury failed to agree, whereupon the cause was continued until the January term, *held*, that he was not entitled to release. It is not necessary, where defendant is put on trial at one term and the jury disagree, that he again be put on trial at the same term: *State v. Enke*, 51 N. W. R., 1146.

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CHAPTER 52.

PROCEEDINGS AND TRIALS BEFORE JUSTICES OF THE PEACE.

6060. Information.

The same strictness is not required in an information for violating an ordinance as in an indictment. The information in a particular case, *held* sufficient: *Bayard v. Baker*, 76–220.

An information is insufficient which merely states the offense charged, though in the language of the statute: *State v. Butcher*, 79–110.

The facts constituting an offense should be stated with as much precision in an information as in an indictment: *Ibid.*

Therefore *held*, that an information which charged the defendant with the crime of unlawfully and wilfully disturbing a school was not sufficient to sustain a conviction, as the acts constituting the offense were not stated: *Ibid.*

An information which fails to state the facts constituting the offense charged cannot be amended by setting out the facts relied upon for the first time, after the verdict has been rendered: *Ibid.*

Although it is proper to state the name of the person assaulted in an information charging assault and battery, yet where the information charged the assault as committed "upon the person of this informant," which information was signed and sworn to, *held*, that the person assaulted was sufficiently designated: *State v. McKinley*, 82–445.

6086. Judgment.

Where defendant was tried before a justice of the peace and found guilty upon the first of several counts of an information, *held*, that by legal inference he was acquitted upon the others, and upon appeal to the district court could only be tried upon the first count: *State v. Severson*, 79–750.

6089. Costs; appeal.

Where defendant has been convicted before a justice of the peace of the crime charged, the costs of the prosecution cannot be taxed in the district court to the prosecuting witness: *State v. Hodgson*, 79–462.

6095. Appeal, how taken.

Where defendant was tried before a justice of the peace upon information which contained several counts, and was found guilty upon the first, *held*, that the legal inference would be that he was acquitted upon the others, and upon appeal to the district court he could only be tried upon the first count: *State v. Severson*, 79–750.

CHAPTER 55.

PARDONS, AND THE REMISSION OF FINES AND FORFEITURES.

6110. By governor.

Neither the district attorney nor board of supervisors has any power to remit fines or to compromise judgments therefor for a less sum than the amount of the fines imposed: *McKay v. Woodruff*, 77–413.

Therefore, where certain judgments were satisfied of record by the district attorney for a less sum than the fines for which they were rendered, and by authority of the board of supervisors, *held*, that the satisfactions were absolutely void and no bar to further proceedings to enforce the judgments: *Ibid.*

And a commutation of the judgments by the governor, so far as they were a lien on certain property, but not releasing defendant from personal liability, and upon condition that he pay all costs and forever refrain from engaging in the saloon business in Iowa, *held* to be no bar to his subsequent arrest and imprisonment, where it did not appear that he had complied with the condition upon which the commutation was granted: *Ibid.*

The governor may remit the forfeiture under a bail bond after judgment has been rendered thereon: *Harbin v. State*, 78–263.

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CHAPTER 56.

ILLEGITIMATE CHILDREN.

6113. Complaint.

It is not allowable to consider unchaste conduct of complainant with other men than defendant, unless it has bearing upon the question of the paternity of the child: *State v. Lavin*, 80–555.

The jury may be directed to consider evidence relating to the connection of complainant with other men, but if they find that defendant is the father of the child it is immaterial whether complainant is chaste or not: *State v. Ginger*, 80–574.

Where it appeared that the mother of the child, about the time the child must have been begotten, was associating with another man than the one sought to be charged as father, and it was claimed that such other man was the father of the child, *held*, that circumstances tending to show illicit cohabitation between such other man and complainant eight years before the time the child was begotten were not too remote, as they would tend to prove what the relations between the parties were at a later time: *State v. Borie*, 79–605.

The only issue under the present statutory provision is the issue of guilty or not guilty, and if the defendant is found guilty the only judgment that can be rendered is to charge him with the maintenance of the child, and with such sum or sums and in such manner as the court shall direct and with the costs of the suit. His liability does not depend upon ability or inability of others to support the child or prevent its becoming a charge on the county, and, therefore, evidence as to the financial condition of complainant should not be admitted: *State v. Lavin*, 80–555.

The fact of an offer to compromise is not admissible in evidence on behalf of complainant: *Ibid.*

This proceeding is to establish a civil liability and the issues are to be determined by the preponderance of the evidence, the weight of the evidence and credibility of the witnesses being for the jury: *State v. Severson*, 78–653.

It is for the jury to weigh the testimony of the witnesses as well as all the facts and circumstances tending to corroborate or discredit them and determine the case according to the preponderance of the evidence: *State v. Ginger*, 80–574.

The fact that the child was born before the usual period of gestation from the time fixed by the complainant in her testimony for the connection with defendant will not be conclusive that defendant was not the father of the child. The exact time of gestation is not a controlling circumstance: *Ibid.*

In a particular case, *held*, that a judgment requiring defendant to pay $100 at once and $50 a year until $700 had been paid was not excessive: *Ibid.*

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TITLE XXVI.

THE DISCIPLINE AND GOVERNMENT OF PRISONS, AND THE PENITENTIARY, ITS GOVERNMENT AND DISCIPLINE.

CHAPTER 2.

THE PENITENTIARY OF THE STATE, AND THE GOVERNMENT AND DISCIPLINE THEREOF.

6210a. Diminution of sentence for good behavior. 23 G. A., ch. 57, § 1. On or after the taking effect of this act every convict who is now or who may hereafter be confined in the penitentiaries of the state of Iowa, and who shall have no infraction of the rules or regulations of the penitentiaries or laws of the state recorded against him, and who performs in a faithful manner the duties assigned to him, shall be entitled to the diminution of time from his sentence as appears in the following table, for the respective years of the sentence and pro rata for any part of a year where the sentence is for more or less than a year, provided, that this act shall not be construed, so as to increase the good time earned by prisoners in the penitentiaries of the state prior to the act going into effect.

Number of Years of Sentence.	Good Time Granted.	Total Good Time Made.	Time to be Served if Full Time is Made.
1st year	1 month	1 month	11 months.
2d year	2 months	3 months	1 year and 9 months.
3d year	3 months	6 months	2 years and 6 months.
4th year	4 months	10 months	3 years and 2 months.
5th year	5 months	1 year and 3 months	3 years and 9 months.
6th year	6 months	1 year and 9 months	4 years and 3 months.
7th year	6 months	2 years and 3 months	4 years and 9 months.
8th year	6 months	2 years and 9 months	5 years and 3 months.
9th year	6 months	3 years and 3 months	5 years and 9 months.
10th year	6 months	3 years and 9 months	6 years and 3 months.
11th year	6 months	4 years and 3 months	6 years and 9 months.
12th year	6 months	4 years and 9 months	7 years and 3 months.
13th year	6 months	5 years and 3 months	7 years and 9 months.
14th year	6 months	5 years and 9 months	8 years and 3 months.
15th year	6 months	6 years and 3 months	8 years and 9 months.
16th year	6 months	6 years and 9 months	9 years and 3 months.
17th year	6 months	7 years and 3 months	9 years and 9 months.
18th year	6 months	7 years and 9 months	10 years and 3 months.
19th year	6 months	8 years and 3 months	10 years and 9 months.
20th year	6 months	8 years and 9 months	11 years and 3 months.
21st year	6 months	9 years and 3 months	11 years and 9 months.
22d year	6 months	9 years and 9 months	12 years and 3 months.
23d year	6 months	10 years and 3 months	12 years and 9 months.
24th year	6 months	10 years and 9 months	13 years and 3 months.
25th year	6 months	11 years and 3 months	13 years and 9 months.

6210b. Forfeiture for misconduct. 23 G. A., ch. 57, § 2. In case any convict shall be guilty of the violation of any of the rules or laws of the penitentiaries or of the state as above provided and has become entitled to any diminution of the sentence by the provisions aforesaid he shall for the first of-

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fense forfeit, if he has made so much, two days, for the second offense four days, for the third offense eight days, and for the fourth offense sixteen days, and in addition thereto whatever number of days more than one that he is in punishment, shall also be forfeited; for more than four offenses or for an escape or attempt to escape the warden shall have the power, with the approval of the governor, to deprive him of any portion of or all the good time that the convict may have earned but not less than is provided for the fourth offense.

6210c. Cumulative sentences. 23 G. A., ch. 57, § 3. Whenever any convict is committed under several convictions with separate sentences they shall be construed as one continuous sentence under this law in the granting or forfeiting of good time.

6210d. Restoration to citizenship. 23 G. A., ch. 57, § 4. The governor shall have the right to grant any convict, that has been, now is, or may be hereafter confined in the penitentiaries, whom he shall deem a proper person to enjoy privilege, a certificate of restoration to all his rights of citizenship, as provided by law, although such convicts may have been guilty of an infraction of the rules and regulations of the prison. The warden upon request of the governor, shall in case of application for such restoration furnish him a statement of the convict's deportment during his imprisonment and may at all time make such recommendations to the governor as he shall deem proper respecting the restoration to citizenship of any convict.

6210e. 23 G. A., ch. 57, § 5. All acts and parts of acts in conflict with this act are hereby repealed.

6219. In what penitentiary prisoners kept.

These provisions vesting in the executive council the authority to determine in which penitentiary convicts shall be confined is not unconstitutional: *O'Brien v. Barr*, 49 N. W. R., 68.

And *held*, that the council might designate by classes instead of by individuals the persons who should be transferred from one penitentiary to another: *Ibid.*

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APPENDIX.

SENATORIAL DISTRICTS.

ACTS OF TWENTY-FOURTH GENERAL ASSEMBLY.

CHAPTER 79 (1892).

AN ACT fixing the number of senators in the general assembly, apportioning them among the several counties according to the number of inhabitants in each, and dividing the state into senatorial districts.

Be it enacted by the General Assembly of the State of Iowa:

SECTION 1. That the number of senators in the general assembly is hereby fixed at fifty, and they are hereby apportioned among the several counties according to the number of inhabitants in each, and under said apportionment the state is hereby divided into fifty senatorial districts, each district to have one senator, as follows:

1. Lee county shall constitute the first district.
2. Jefferson county and Van Buren county shall constitute the second district.
3. Appanoose county and Davis county shall constitute the third district.
4. Wayne county and Lucas county shall constitute the fourth district.
5. Ringgold county, Decatur county and Union county shall constitute the fifth district.
6. Taylor county and Adams county shall constitute the sixth district.
7. Page county and Fremont county shall constitute the seventh district.
8. Mills county and Montgomery county shall constitute the eighth district.
9. Des Moines county shall constitute the ninth district.
10. Henry county and Washington county shall constitute the tenth district.
11. Warren county and Clarke county shall constitute the eleventh district.
12. Poweshiek county and Keokuk county shall constitute the twelfth district.
13. Wapello county shall constitute the thirteenth district.
14. Mahaska county shall constitute the fourteenth district.
15. Marion county and Monroe county shall constitute the fifteenth district.
16. Madison county and Adair county shall constitute the sixteenth district.
17. Audubon county and Dallas county and Guthrie county shall constitute the seventeenth district.
18. Cass county and Shelby county shall constitute the eighteenth district.
19. Pottawattamie county shall constitute the nineteenth district.

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20. Muscatine county and Louisa county shall constitute the twentieth district.
21. Scott county shall constitute the twenty-first district.
22. Clinton county shall constitute the twenty-second district.
23. Jackson county shall constitute the twenty-third district.
24. Jones county and Cedar county shall constitute the twenty-fourth district.
25. Johnson county and Iowa county shall constitute the twenty-fifth district.
26. Linn county shall constitute the twenty-sixth district.
27. Webster county and Calhoun county shall constitute the twenty-seventh district.
28. Marshall county shall constitute the twenty-eighth district.
29. Jasper county shall constitute the twenty-ninth district.
30. Polk county shall constitute the thirtieth district.
31. Story county and Boone county shall constitute the thirty-first district.
32. Woodbury county shall constitute the thirty-second district.
33. Buchanan county and Delaware county shall constitute the thirty-third district.
34. Harrison county, Monona county and Crawford county shall constitute the thirty-fourth district.
35. Dubuque county shall constitute the thirty-fifth district.
36. Clayton county shall constitute the thirty-sixth district.
37. Wright county, Hamilton county and Hardin county shall constitute the thirty-seventh district.
38. Black Hawk county and Grundy county shall constitute the thirty-eighth district.
39. Butler county and Bremer county shall constitute the thirty-ninth district.
40. Allamakee county and Fayette county shall constitute the fortieth district.
41. Mitchell county and Worth county and Winnebago county shall constitute the forty-first district.
42. Winneshiek county and Howard county shall constitute the forty-second district.
43. Cerro Gordo county, Franklin county and Hancock county shall constitute the forty-third district.
44. Floyd county and Chickasaw county shall constitute the forty-fourth district.
45. Tama county and Benton county shall constitute the forty-fifth district.
46. Ida county, Cherokee county, and Plymouth county shall constitute the forty-sixth district.
47. Kossuth county, Emmet county, Dickinson county, Clay county and Palo Alto county shall constitute the forty-seventh district.
48. Carroll county, Sac county, and Greene county shall constitute the forty-eighth district.
49. O'Brien county, Osceola county, Lyon county and Sioux county shall constitute the forty-ninth district.
50. Buena Vista county, Pocahontas county and Humboldt county shall constitute the fiftieth district.

Approved April 6, 1892.

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REPRESENTATIVE DISTRICTS.

ACTS OF TWENTY-FOURTH GENERAL ASSEMBLY.

CHAPTER 80 (1892).

AN ACT to apportion the state into representative districts and declaring the ratio of representation.

Be it enacted by the General Assembly of the State of Iowa:

SECTION 1. That one representative from every twenty-two thousand inhabitants is hereby constituted the ratio of apportionment and that each representative district shall be as hereinafter described:

SEC. 2. Lee county shall be the first district and entitled to two representatives (37,702).

SEC. 3. Van Buren shall be the second district and entitled to one representative (16,243).

SEC. 4. Davis county shall be the third district and entitled to one representative (15,230).

SEC. 5. Appanoose county shall be the fourth district and entitled to one representative (15,930).

SEC. 6. Wayne county shall be the sixth district and entitled to one representative (15,657).

SEC. 7. Decatur county shall be the sixth district and entitled to one representative (15,643).

SEC. 8. Ringgold county shall be the seventh district and entitled to one representative (13,541).

SEC. 9. Taylor county shall be the eighth district and entitled to one representative (16,377).

SEC. 10. Page county shall be the ninth district and entitled to one representative (21,308).

SEC. 11. Fremont county shall be the tenth district and entitled to one representative (16,839).

SEC. 12. Mills county shall be the eleventh district and entitled to one representative (14,552).

SEC. 13. Montgomery county shall be the twelfth district and entitled to one representative (15,782).

SEC. 14. Adams county shall be the thirteenth district and entitled to one representative (12,279).

SEC. 15. Union county shall be the fourteenth district and entitled to one representative (16,885).

SEC. 16. Clarke county shall be the fifteenth district and entitled to one representative (11,314).

SEC. 17. Lucas county shall be the sixteenth district and entitled to one representative (14,556).

SEC. 18. Monroe county shall be the seventeenth district and entitled to one representative (13,657).

SEC. 19. Wapello county shall be the eighteenth district and entitled to one representative (30,416).

SEC. 20. Jefferson county shall be the nineteenth district and entitled to one representative (15,179).

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SEC. 21. Henry county shall be the twentieth district and entitled to one representative (18,876).

SEC. 22. Des Moines county shall be the twenty-first district and entitled to two representatives (35,275).

SEC. 23. Louisa county shall be the twenty-second district and entitled to one representative (11,873).

SEC. 24. Washington county shall be the twenty-third district and entitled to one representative (18,453).

SEC. 25. Keokuk county shall be the twenty-fourth district and entitled to one representative (23,800).

SEC. 26. Mahaska county shall be the twenty-fifth district and entitled to one representative (25,763).

SEC. 27. Marion county shall be the twenty-sixth district and entitled to one representative (22,048).

SEC. 28. Warren county shall be the twenty-seventh district and entitled to one representative (18,254).

SEC. 29. Madison county shall be the twenty-eighth district and entitled to one representative (15,966).

SEC. 30. Adair county shall be the twenty-ninth district and entitled to one representative (14,514).

SEC. 31. Cass county shall be the thirtieth district and entitled to one representative (19,634).

SEC. 32. Pottawattamie county shall be the thirty-first district and entitled to two representatives (47,332).

SEC. 33. Harrison county shall be the thirty-second district and entitled to one representative (21,247).

SEC. 34. Shelby county shall be the thirty-third district and entitled to one representative (17,567).

SEC. 35. Audubon county shall be the thirty-fourth district and entitled to one representative (12,372).

SEC. 36. Guthrie county shall be the thirty-fifth district and entitled to one representative (16,721).

SEC. 37. Dallas county shall be the thirty-sixth district and entitled to one representative (20,470).

SEC. 38. Polk county shall be the thirty-seventh district and entitled to one representative (65,362).

SEC. 39. Jasper county shall be the thirty-eighth district and entitled to one representative (24,557).

SEC. 40. Poweshiek county shall be the thirty-ninth district and entitled to one representative (18,316).

SEC. 41. Iowa county shall be the fortieth district and entitled to one representative (18,261).

SEC. 42. Johnson county shall be the forty-first district and entitled to one representative (21,655).

SEC. 43. Muscatine county shall be the forty-second district and entitled to one representative (24,478).

SEC. 44. Scott county shall be the forty-third district and entitled to two representatives (43,472).

SEC. 45. Cedar county shall be the forty-fourth district and entitled to one representative (18,275).

SEC. 46. Clinton county shall be the forty-fifth district and entitled to two representatives (41,184).

SEC. 47. Jackson county shall be the forty-sixth district and entitled to one representative (22,262).

SEC. 48. Jones county shall be the forty-seventh district and entitled to one representative (20,262).

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SEC. 49. Linn county shall be the forty-eighth district and entitled to two representatives (40,293).

SEC. 50. Benton county shall be the forty-ninth district and entitled to one representative (24,172).

SEC. 51. Tama county shall be the fiftieth district and entitled to one representative (21,645).

SEC. 52. Marshall county shall be the fifty-first district and entitled to one representative (25,827).

SEC. 53. Story county shall be the fifty-second district and entitled to one representative (18,107).

SEC. 54. Boone county shall be the fifty-third district and entitled to one representative (23,772).

SEC. 55. Greene county shall be the fifty-fourth district and entitled to one representative (15,762).

SEC. 56. Carroll county shall be the fifty-fifth district and entitled to one representative (15,502).

SEC. 57. Crawford county shall be the fifty-sixth district and entitled to one representative (18,887).

SEC. 58. Monona and Ida counties shall be the fifty-seventh district and entitled to one representative (25,180).

SEC. 59. Woodbury county shall be the fifty-eighth district and entitled to two representatives (55,710).

SEC. 60. Cherokee county shall be the fifty-ninth district and entitled to one representative (15,650).

SEC. 61. Sac county shall be the sixtieth district and entitled to one representative (14,514).

SEC. 62. Calhoun county shall be the sixty-first district and entitled to one representative (13,103).

SEC. 63. Webster county shall be the sixty-second district and entitled to one representative (21,539).

SEC. 64. Hamilton county shall be the sixty-third district and entitled to one representative (15,305).

SEC. 65. Hardin county shall be the sixty-fourth district and entitled to one representative (18,878).

SEC. 66. Grundy county shall be the sixty-fifth district and entitled to one representative (13,295).

SEC. 67. Black Hawk county shall be the sixty-sixth district and entitled to one representative (24,226).

SEC. 68. Buchanan county shall be the sixty-seventh district and entitled to one representative (18,964).

SEC. 69. Delaware county shall be the sixty-eighth district and entitled to one representative (17,346).

SEC. 70. Dubuque county shall be the sixty-ninth district and entitled to two representatives (49,584).

SEC. 71. Clayton county shall be the seventieth district and entitled to one representative (22,675).

SEC. 72. Fayette county shall be the seventy-first district and entitled to one representative (23,116).

SEC. 73. Bremer county shall be the seventy-second district and entitled to one representative (14,611).

SEC. 74. Butler county shall be the seventy-third district and entitled to one representative (15,431).

SEC. 75. Franklin county shall be the seventy-fourth district and entitled to one representative (12,800).

SEC. 76. Wright and Hancock counties shall be the seventy-fifth district and entitled to one representative (19,678).

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SEC. 77. Humboldt and Pocahontas counties shall be the seventy-sixth district and entitled to one representative (19,389).

SEC. 78. Buena Vista county shall be the seventy-seventh district and entitled to one representative (13,494).

SEC. 79. Plymouth county shall be the seventy-eighth district and entitled to one representative (19,374).

SEC. 80. Sioux county shall be the seventy-ninth district and entitled to one representative (18,370).

SEC. 81. O'Brien and Lyon counties shall be the eightieth district and entitled to one representative (21,696).

SEC. 82. Osceola, Emmet, and Dickinson counties shall be the eighty-first district and entitled to one representative (14,176).

SEC. 83. Palo Alto and Clay counties shall be the eighty-second district and entitled to one representative (18,627).

SEC. 84. Kossuth county shall be the eighty-third district and entitled to one representative (13,118).

SEC. 85. Cerro Gordo county shall be the eighty-fourth district and entitled to one representative (14,854).

SEC. 86. Floyd county shall be the eighty-fifth district and entitled to one representative (15,379).

SEC. 87. Chickasaw county shall be the eighty-sixth district and entitled to one representative (15,019).

SEC. 88. Allamakee county shall be the eighty-seventh district and entitled to one representative (17,856).

SEC. 89. Winneshiek county shall be the eighty-eighth district and entitled to one representative (22,462).

SEC. 90. Howard county shall be the eighty-ninth district and entitled to one representative (11,172).

SEC. 91. Mitchell county shall be the ninetieth district and entitled to one representative (13,272).

SEC. 92. Worth and Winnebago counties shall be the ninety-first district and entitled to one representative (16,567).

Approved April 6, 1892.

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GEOLOGICAL SURVEY OF THE STATE.

ACTS OF TWENTY-FOURTH GENERAL ASSEMBLY.

CHAPTER 71 (1892).

AN ACT to provide for a geological survey of the state of Iowa.

Be it enacted by the General Assembly of the State of Iowa:

SECTION 1. There is hereby created and established a geological survey for the state of Iowa, which shall be under the direction and in charge of the geological board, which shall consist of the governor, the state auditor, the presidents of the agricultural college, the state university, and the Iowa academy of sciences.

SEC. 2. The duties of the geological board shall be to have oversight and full control of the surveys, except as herein otherwise provided; to appoint a state geologist, and such expert assistants, recommended by the state geologist, as may be necessary to audit accounts; and to annually furnish for publication a report of the operations of the survey.

SEC. 3. The duty of the director, for state geologist, shall be to make a complete survey of the natural resources of the state, in all their economic and scientific aspects; including the determination of the order, arrangement, dip, and comparative magnitude of the various formations; the discovery and examination of all useful deposits, their richness in mineral contents, and their fossils; and the investigation of the position, formation and arrangement of the many different ores, coals, clays, building stones, glass sands, marls, peats, mineral oils, natural gas, mineral and artesian waters, and such other mineral materials as may be useful, with particular regard to the value of said substances for commercial purposes and their accessibilities; also the quasi noting of the characters of the various soils and their capacities for agricultural purposes; the growth of timber and other scientific or natural history matters that may be of practical importance and interest. A complete cabinet collection may, at the option of the board, bemade to illustrate the natural products of the state; and the board may also furnish suits of materials, rocks and fossils for colleges and public museums located within the state, *provided* the general state collection is not made to suffer thereby.

SEC. 4. It shall, further, be the duty of the state geologist to make, or cause to be made detailed maps and reports of counties or districts as fast as the work is completed, which maps shall embrace all such geological, mineralological, topograpical and scientific details necessary to make complete reports of the said districts. Whenever the information obtained warrants it, the results of any special investigation of agricultural or geological phenomena shall be brought together in a memoir or final report for publication, accompanied by proper illustrations and diagrams. On, or before, the first day of January of each year, the state geologist shall lay before the geological board a full report of the work of the preceding year together with such minor reports and papers as may be considered desirable for publication. When occasion requires, important information may be issued in the form of special bulletins, for the immediate use of the people at large. From time to time items of general interest, or announcements of new discoveries, may be furnished the newspapers or periodicals for publication.

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SEC. 5. The reports contemplated in this act shall, under the direction of the board, be disposed of as follows: 1. To each of the present state officers and to each member of this assembly who shall annually send his address to the geological board, one copy of each published volume; and to each member of any future assembly which shall authorize the publication of any report, one copy of such report shall be sent. 2. Twenty copies of each volume published shall be furnished to the state library; ten copies to the state historical society, state university, state agricultural society and state horticultural board; two copies to each chartered college and normal school in Iowa; and to the libraries of each state institution, the Iowa academy of sciences, Davenport academy of sciences, and to the general officers of each railroad that has furnished aid to the survey. 3. One copy of each volume to each public library, to the library of each academy or other educational institution, to each scientific society in the state; to each first class library, to each scientific survey or organization issuing regular publications, beyond the limits of the state; and to each geologist of national reputation on receiving his written application therefor. 4. All remaining volumes, after retaining a sufficient number to supply future demands, shall be sold to persons making application for them at the cost price of publication of such volume, the moneys thus accruing to be turned into the treasury of the state.

SEC. 6. For the purpose of carrying out the provisions of this act the sum of ten thousand dollars, or as much thereof as may be needed, is hereby annually appropriated for the next biennial term.

SEC. 7. The members of the board shall be allowed the actual expenses attending the duties assigned them by this act. The salary of the state geologist and his expert and all other assistants shall be fixed by the geological board, and shall be a part of, and come out of the sum provided for in section six. The necessary postage, stationery and office expenses of the state geologist shall be paid by the state as the expenses of other state officers are provided for. The expense of printing, engraving, binding and distribution of the reports of the survey shall be paid out of any moneys, not otherwise appropriated, in the state treasury on warrants of the state auditor approved by the geological board.

SEC. 8. All previous acts, or parts of acts inconsistent with this act are hereby repealed.

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CONSTITUTION OF IOWA.

ARTICLE 1. BILL OF RIGHTS.

Laws uniform.

A statute making special provisions as to the time for bringing actions on insurance policies different from the provisions relating to actions on other contracts is not unconstitutional by reason of not being of uniform operation: *Christie v. Life Indemnity, etc., Co.*, 82–360.

A statute specially applicable to itinerant vendors is not unconstitutional: *State v. Goerss*, 51 N. W. R., 1147.

Trial by jury; due process of law.

The proceeding auxiliary to execution authorized by § 4374 is not in violation of the guaranty of the right to trial by jury: *Marriage v. Woodruff*, 77–292.

A statute providing for the forfeiture of property by reason of the use thereof in the manufacture or sale of intoxicating liquors contrary to law, such forfeiture to take place, however, upon an adjudication of the court and proceedings to abate the premises as a nuisance, is not unconstitutional: *Craig v. Werthmueller*, 78–598.

Due process of law is not confined alone to law and chancery actions. Special proceedings applicable to specified subject-matter conformable to the rules requiring notice and the acquisition of jurisdiction, and which affect all persons alike whose property or rights come within the lawful scope of the proceeding, are prosecuted by due process of law: *Burlington, C. R. & N. R. Co. v. Dey*, 82–312.

Therefore *held*, that the statute giving railroad commissioners authority to fix joint rates over connecting lines of road, with an opportunity to the roads interested to have a hearing before such commissioners on notice, does not deprive them of their property without due process of law: *Ibid.*

The exercise of the taxing power in accordance with the law of the state whereby assessments are levied upon property is not the taking of property without due process of law: *Yeomans v. Riddle*, 50 N. W. R., 886.

While it is true as a general rule that the title to real property of one who dies intestate vests immediately in his heirs, yet such descent is regulated by statute, and it is competent for the legislative power to impose upon the property inherited such conditions as it shall deem proper to enact: *Van Aken v. Clark*, 82–256.

Rights of persons accused.

An inquest of lunacy is not a criminal proceeding and the party whose sanity is questioned has not the right to a jury trial: *In re Bresee*, 82–573.

Although the constitutions of the United States and of the state of Iowa contemplate a trial by a jury of twelve men, the defendant in a criminal prosecution may waive his right and consent to a trial by a less number: *State v. Grossheim*, 79–75.

Twice tried; bail.

Where defendant was tried and acquitted upon an indictment for uttering and publishing as true a certain false and forged note and chattel mortgage, *held*, that he could not be subsequently prosecuted upon an indictment for obtaining property under false pretenses in exchange for such note and mortgage, when the transactions relied on in both indictments were the same: *State v. Stone*, 75–215.

Where a statute as to the punishment of the crime of nuisance in maintaining a place for the sale of intoxicating liquors was amended, and it was provided that the former law should remain in effect as to offenses already committed, *held*, that the prosecution of the offense under an indictment charging its commission during a time previous to the amendment of the statute was not barred by an acquittal under an indictment charging the commission of the same offense during a time subsequent to the amendment of the statute: *State v. Webber*, 76–686.

Excessive bail; excessive fines.

The penalties prescribed by statutes regulating railroad rates, *held* not unconstitutional as being excessive: *Burlington, C. R. & N. R. Co. v. Dey*, 82–312.

Eminent domain.

Private property cannot be properly taken for a private way. Therefore, *held*, that where the sole purpose of a road which was attempted to be laid out as a public highway was to give more convenient outlet to the owner of a tract of land, who already had an outlet by public highway, the taking of a right of way over the lands of another for such

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purpose was unconstitutional: *Richards v. Wolf*, 82–358.

The provisions of § 635, allowing damages to one whose property is injured by reason of change of grade in an adjoining street, do not relate to the taking of private property for public use, and the benefits resulting to the property from such change may be taken into account: *Stewart v. Council Bluffs*, 50 N. W. R., 219.

The taking of private property by a railroad company for a right of way is the exercise of a public right, and the duty imposed by the state in such case of providing crossings for the owner whose land is taken is a public duty, with reference to which the board of railroad commissioners has jurisdiction: *State v. Mason City & Ft. D. R. Co.*, 52 N. W. R., 490.

A tract of eighteen acres of land occupied as a homestead and situated within the city limits, which has never been platted, but which is surrounded on all sides by land laid out into lots, streets and alleys, and which is benefited by city improvements, such as light, water, streets, railroads and fire stations, *held* subject to taxation for city purposes: *Perkins v. Burlington*, 77–553.

Attainder; ex post facto laws; obligation of contracts.

By statute (§ 1649) the legislature has reserved the right to repeal and amend articles of incorporation of corporations organized after its enactment, and also to impose such conditions upon the enjoyment of the franchise as the general assembly may deem necessary for the public good. Therefore, *held*, that a street-car company could properly be subjected to further burdens in regard to the paving of its tracks than those imposed by law at the time its franchise was granted: *Sioux City Street R. Co. v. Sioux City*, 78–367; *S. C.*, 78–742.

The state has not by any legislation delegated to municipal corporations the powers reserved to the legislature by this section of the Code: *Ibid.*

Railroad corporations are subject to legislative control as to the rates of fare and freight unless protected by their charters: *Burlington, C. R. & N. R. Co. v. Dey*, 82–312.

It is not competent for the legislature by a statute of limitations to take away all remedies existing upon causes of action: *Kennedy v. Des Moines*, 50 N. W. R., 880.

Therefore, *held*, that a statute requiring claims against cities for personal injuries to be presented within ninety days after the injury would not be considered as applicable to a claim for injuries received more than ninety days before the statute took effect: *Ibid.*

Article 2. Right of Suffrage.

Ballot.

The word election, as here used, means the choice of persons for public offices made by the people, and does not apply to votes of the electors in district townships in the levy of a school tax at a district meeting: *Seaman v. Baughman*, 82–216.

Article 3. The Distribution of Powers; Legislative Department.

General assembly.

While the legislature cannot delegate legislative power to the courts or to any other authority, yet proceedings for the annexation of territory to a municipal corporation may be authorized before a court: *Ford v. North Des Moines*, 80–626.

Where by statute the assent of a majority of the voters of a city or a town to the erection of water-works was required, *held*, that the council might, by ordinance, first determine the conditions involved in the proposition submitted to vote: *Taylor v. McFadden*, 50 N. W. R., 1070.

Acts; one subject; expressed in title.

An act is to embrace but one subject and matters properly connected therewith; but *held*, that a provision with reference to the time after which action on an insurance policy might be brought was properly connected with the subject of an act relating to insurance: *Christie v. Life Indemnity, etc., Co.*, 82–360.

An act legalizing proceedings of a board of supervisors for the location and construction of a levee and providing for the assessment of the costs thereof, *held* not to embrace two subjects: *Richman v. Supervisors of Muscatine County*, 77–513.

A particular statute *held* not unconstitutional as embracing more than one subject: *State v. Aulman*, 76–624.

The subject of a legislative act prohibiting the sale of adulterated lard, unless labeled in a certain manner, showing the ingredients of which it is composed, is sufficiently expressed in the title as "an act to prevent fraud in the sale of lard and to provide punishment for the violation thereof:" *State v. Snow*, 81–642.

Where a statute was entitled "an act relating to insurance and fire insurance companies," *held*, that the title sufficiently embraced provisions with reference to the time after which action on a policy could be brought: *Christie v. Life Indemnity, etc., Co.*, 82–360.

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Local or special laws.

A curative act legalizing the proceedings of a board of supervisors by which a levee was constructed and the costs of construction assessed to the adjacent property, *held* not obnoxious to this section, as the state of facts was such that it would not come within the provisions of a general law: *Richman v. Supervisors of Muscatine County*, 77–513.

Article 4. Executive Department.

Pardons.

The governor may remit the penalty for forfeiture under a bail bond, even after a judgment on such bond has been rendered: *Harbin v. State*, 78–263.

Neither the district attorney nor board of supervisors has any authority to remit fines or to compromise judgments therefor, for a less sum than the amount of the fine imposed: *McKay v. Woodruff*, 77–418.

Therefore, where certain judgments were satisfied of record by the district attorney for a less sum than the fines for which they were rendered, and by authority of the board of supervisors, *held*, that the satisfactions were absolutely void and no bar to further proceedings to enforce the judgments: *Ibid.*

And a commutation of the judgments by the governor so far as they were a lien on certain property, but not releasing defendant from personal liability, and upon condition that he pay all costs and forever refrain from engaging in the saloon business in Iowa, *held* to be no bar to his subsequent arrest and imprisonment, when it did not appear that he had complied with the condition upon which the commutation was granted: *Ibid.*

Article 5. Judicial Department.

Courts.

Jurisdiction: It is competent for the legislature to determine that terms of court may be held at places other than the county seat for the transaction of certain business and for the trial of particular classes of cases: *Wilner v. Chicago, M. & St. P. R. Co.*, 77–755.

Therefore, the establishment of a district court at Avoca with power to try cases arising in a certain designated part of Pottawattamie county is not repugnant to this section of the constitution: *Ibid.*

It is not unconstitutional to vest in the executive council the authority to determine in which one of the penitentiaries of the state a convict shall be confined: *O'Brien v. Barr*, 49 N. W. R., 68.

Although the board of railroad commissioners may not be a court it may still be given jurisdiction to investigate and determine by prescribed rules and judicial inquiry questions submitted to it under statutory authority: *State v. Mason City & Ft. D. R. Co.*, 52 N. W. R., 490.

A suit to control the discretion of the executive council in entering into a contract in behalf of the state is in effect a suit against the state and cannot be maintained: *Mills Publishing Co. v. Larrabee*, 78–97.

Determining validity of statute: The court will not without invitation by argument, upon the expression of mere doubt, enter upon inquiry as to the constitutionality of a statute. Such a duty is the gravest and most delicate which a court can be called upon to discharge. A statute will not be declared void for unconstitutionality unless in a clear case after the fullest opportunity for consideration of the questions involved: *Henderson v. Robinson*, 76–603.

A court can only adjudge a law invalid or unconstitutional in a case where a party is to be deprived of his rights in consequence of the invalidity of the law: *State v. Mosher*, 78–321.

The court will uphold a statute as constitutional unless so plainly and palpably in conflict with the constitution as to leave no doubt or hesitation in the judicial mind as to its invalidity: *Burlington, C. R. & N. R. Co. v. Dey*, 82–312.

Grand jury.

The provision that when the grand jury consists of five members an indictment may be found upon the concurrence of four jurors is not in conflict with the constitution on the ground that it authorizes an indictment to be found by less than the smallest number of which the grand jury can be composed: *State v. Salts*, 77–193.

Article 11. Miscellaneous.

Indebtedness of political or municipal corporations.

The issuance of new bonds, the proceeds of which are to be used in extinguishing existing bonds, is an increase of indebtedness, and if such increase is beyond the constitutional limit the bonds are invalid (reversing 42 Fed. R., 644): *Doon Township v. Cummins*, 142 U. S., 366.

The municipal corporation or its officers cannot render such bonds valid by ratification as by making payments of interest thereon: *Ibid.*

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Representations of a county agent as to the validity of the debt to be refunded will not estop the county: *Ætna L. Ins. Co. v. Lyon County*, 44 Fed. R., 329.

But a judgment on the prior indebtedness will be conclusive of its validity: *Ibid.*

If the refunding bonds are in excess of the valid indebtedness of the county they will not be deemed issued in the order of their number, but the equities of the respective holders may be adjusted in a proper action. The rights of the holders cannot be adjusted in an action at law: *Ibid.*

A party who becomes the creditor of a municipal corporation must at his peril take notice of the fact that its indebtedness is in excess of the constitutional limitation: *Kane v. Independent School Dist.*, 83–5.

The fact that the officers of the corporation permit the person holding the illegal indebtedness to obtain judgment therefor estops the corporation, and it may set up the defense in a *mandamus* proceeding wherein it is sought to compel the officers of the corporation to levy a tax for the payment of such judgment: *Ibid.*

A purchaser of bonds is chargeable with notice of the assessment of the municipal corporation, and that the amount of bonds issued, as shown by recitals on the bonds, constitutes an indebtedness in excess of the limit (affirming 25 Fed. R., 635): *Nesbit v. Independent Dist.*, 12 S. C. R., 746.

Where by virtue of a compromise the city received one sum of money, and issued its certificate for a smaller sum, *held*, that such warrant would not be deemed void as incurring an indebtedness in excess of the constitutional limitation: *Hintrager v. Richter*, 52 N. W. R., 188.

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TABLE OF SESSION LAWS.

TWENTY-THIRD GENERAL ASSEMBLY (1890).

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
1	An act to extend the limits of cities, and for other purposes incidental thereto..... Took effect by publication, March 14, 1890.	.....	586*a*–586*f*
2	An act to amend chapter 16, Laws of the Twenty-second General Assembly, entitled: "An act granting additional powers to certain cities of the first class, and to cities organized under special charters, and cities of the second class having over seven thousand inhabitants"..... Took effect July 4, 1890.	.....	725
3	An act conferring additional powers upon certain cities of the first class in respect to assessors..... Took effect by publication, April 1, 1890.	.....	798*a*, 798*b*
4	An act to authorize certain cities of the first class to issue bonds and to provide for their payment, principal and interest..... Took effect by publication, March 29, 1890.	.....	823*a*–823*h*
5	An act authorizing in certain cities a special tax for the grading of streets..... Took effect by publication, April 16, 1890.	.....	882*a*–882*c*
6	An act authorizing cities to deepen, widen, straighten, wall up, cover, fill, alter, change or divert from its natural channel, and to conduct the same in artificial channels, or into or through covered drains or sewers, to be constructed for the purpose, any water-course or any part thereof, within the corporate limits of said cities, and to provide the manner in which the same shall be done, and to authorize the levy and collection of special tax, and the levy and collection of special assessments to defray the cost and expenses thereof..... Took effect July 4, 1890.	.....	858*a*–858*n*
7	An act to amend chapter 16 of the acts of the Twenty-second General Assembly, relating to improvements of and granting additional powers to cities of the first and second class. Took effect July 4, 1890.	.....	725
8	An act to establish and maintain a fire department in cities of the second class..... Took effect July 4, 1890.	.....	793*d*, 793*e*
9	An act to amend chapter 20 of the acts of the Twentieth General Assembly of Iowa, by including within the provisions thereof certain cities of the second class..... Took effect by publication, April 10, 1890.	.....	824, 829

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CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
10	An act to extend to cities of the second class having more than three thousand population the provisions of chapter 162, acts of the Seventeenth General Assembly. Took effect July 4, 1890.	.....	838
11	An act conferring upon cities and incorporated towns certain additional powers relating to the construction of street railways, and to define the motive power thereof. Took effect by publication, April 30, 1890.	.....	623*a*, 623*b*
12	An act to amend section 1 of chapter 17, Laws of the Twenty-second General Assembly. Took effect July 4, 1890.	.....	755
13	An act to repeal section 1 of chapter 10 of the Laws of the Twenty-second General Assembly, and to enact a substitute therefor. Took effect by publication, April 2, 1890.	.....	645*a*, 793
14	An act making further provisions with respect to contracts by cities organized under special charters for paving and curbing streets, and the construction of sewers and the making and collection by such cities of assessments and the issuance of bonds or certificates by such cities to pay for such improvements. Took effect by publication, April 18, 1890.	.....	750*a*–750*u*
15	An act entitling persons paying special taxes assessed upon real estate for the improvement of streets in cities existing under special charters having a population of twenty thousand under the census of 1885, to be credited with the amount of such special tax so paid upon any general road or street tax charged against them on account of same real estate. Took effect July 4, 1890.	.....	960*a*
16	An act to grant cities under special charter the power to fix the compensation of their mayors, and to legalize compensation heretofore paid to the mayors of such cities. Took effect by publication, April 2, 1890.	.....	910*a*, 910*b*
17	An act to amend chapter 28 of the acts of the Twenty-second General Assembly, giving authority for the making of rates for the transportation of freight and cars over two or more lines of railroad within this state and enlarging the powers and further defining the duties of the board of railroad commissioners. Took effect by publication, April 16, 1890.	.....	2080*a*–2080*e*
18	An act requiring all railroads, corporations, companies and persons operating a railroad and doing business in Iowa, to equip all their engines and cars with proper, efficient and safe automatic couplers and brakes, and for prescribing penalties for failure thereof. Took effect July 4, 1890.	.....	5419*a*–5419*f*
19	An act to amend sections 6 and 7 of chapter 159 of the Laws of the Twentieth General Assembly of Iowa in relation to taxes in aid of railroads. Took effect by publication, March 23, 1890.	.....	2086, 2087
20	An act to amend chapter 30 of the Laws of the Twenty-second General Assembly, and to remit certain penalties incurred thereunder. Took effect by publication, April 16, 1890.	.....	1974, 1974*a*
21	An act to amend section 1, chapter 32, Laws of the Eighteenth General Assembly of the state of Iowa, relating to the extension of street railways over highways in certain cases. Took effect by publication, April 10, 1890.	.....	1947

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CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
22	An act to amend chapter 167, Laws of the Ninetee[n]th General Assembly in relation to state certificates and diplomas to teachers Took effect by publication, March 9, 1890.	.....	2600
23	An act to repeal sections 1, 2, 3, of chapter 12, of the acts of the Eighteenth General Assembly relative to the management of the permanent school fund and to enact substitutes therefor Took effect by publication, April 4, 1890.	.....	3020–3023*a*
24	An act authorizing and empowering the boards of directors of school districts to purchase text-books, and allowing the electors of districts and counties to decide the question of uniformity, and to provide means and authority for purchase of school books and supplies Took effect July 4, 1890.	.....	2853*a*–2853*m*
25	An act authorizing boards of supervisors in certain cases to change the boundaries of townships without reference to lines of school districts (chapter 1, acts of the Twenty-third General Assembly) Took effect July 4, 1890.	.....	518*a*, 518*b*
26	An act to amend sections 289 and 290 of the Code of 1873, as amended by chapter 91, Laws of the Twenty-second General Assembly of the state of Iowa, relating to the bonding of county indebtedness Took effect April 8, 1890.	.....	876, 877
27	An act to amend section 391, title 4, chapter 9 of the Code, in relation to places of election and compensation for the use thereof Took effect July 4, 1890.	.....	530
28	An act for the punishment of pools, trusts, combinations and conspiracies, and as to evidence in such cases Took effect by publication, May 14, 1890.	.....	5453*a*–5453*i*
29	An act to repeal chapter 45 of the Laws of the Seventeenth General Assembly and to enact a substitute therefor, to establish a weather and crop service and for the collection and dissemination of crop statistics and meteorological data Took effect by publication, April 26, 1890.	.....	2448*a*–2448*f*
30	An act relating to certain additional justices of the peace and constables, legalizing their official acts and the official acts of canvassing boards with reference thereto. (Section 590, Code) Took effect by publication, April 23, 1890.	.....	1086
31	An act relating to the drawing of monies [moneys] from the state treasury Took effect by publication, April 30, 1890.	.....	91*a*–91*d*
32	An act to amend section 812 of the Code, in relation to issuing bonds by counties in certain cases Took effect by publication, May 8, 1890.	.....	433–433*b*
33	An act to prevent discrimination in life insurance Took effect by publication, April —, 1890.	.....	1760*a*, 1760*b*
34	An act for the protection and preservation of fish and repealing sections 1, 2, 3, 4, 6, 7, 8, 9, 10 and 11 of chapter 50, acts of the Fifteenth General Assembly, chapter 70, acts of the Sixteenth General Assembly, sections 3, 5, 6, 7 and 8 of chapter 80, acts of the Seventeenth General Assembly, chapter 92, acts of the Eighteenth General Assembly, and chapter 9, acts of the Twentieth General Assembly Took effect by publication, April 4, 1890.	.....	5402*a*–5402*n*

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CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
35	An act to provide for and regulate the keeping and sale of intoxicating liquors for lawful purposes, and to repeal sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19, of chapter 71, Laws of the Twenty-second General Assembly ..... Took effect by publication, April 23, 1890.	.....	2359*a*–2359*t*
36	An act to amend section 1 of chapter 137, acts of the Nineteenth General Assembly, relating to pharmacists registered without examination ..... Took effect July 4, 1890.	.....	2526
37	An act to amend section 589 of the Code, in reference to the election of county auditor..... Took effect July 4, 1890.	.....	1034–1034*b*
38	An act to legalize conveyances of real property by executors or trustees under foreign wills ..... Took effect July 4, 1890.	.....	3553*a*
39	An act to provide for assessment for taxation of the shares of capital stock of banking associations organized under the general incorporation laws of this state..... Took effect July 4, 1890.	.....	1289*a*
40	An act to amend section 2077, Code of Iowa, relating to interest ..... Took effect July 4, 1890.	.....	3253
41	An act to amend section 17, chapter 94, Laws of the Nineteenth General Assembly..... Took effect July 4, 1890.	.....	5056
42	An act to amend section 2272 of the Code of 1873, and to provide for appointing guardians of the person of habitual drunkards, and for the custody, restraint and confinement of habitual drunkards, and their reformation, under orders of the district court or the judge thereof, and for terminating such guardianship ..... Took effect July 4, 1890.	.....	3463–3463*b*
43	An act relating to tramps, their arrest, trial and punishment, and prescribing penalties for violation of this act, and repealing chapter 69, Laws of the Sixteenth General Assembly..... Took effect July 4, 1890.	.....	5526*a*–5526*k*
44	An act to amend chapter 25 of the Laws of the Fourteenth General Assembly, entitled an act for the encouragement of horticulture and forestry..... Took effect July 4, 1890.	.....	1678*a*
45	An act to amend section 2094 of the Code of 1873, establishing "Labor Day" as a legal holiday..... Took effect July 4, 1890.	.....	3971
46	An act to amend section 9, chapter 21, acts of the Twentieth General Assembly, as amended by section 2, chapter 56, acts of the Twenty-second General Assembly, relative to escape-shafts in coal mines..... Took effect July 4, 1890.	.....	2457
47	An act to protect laborers and miners for labor performed in developing and working in coal mines, additional to chapter 100, acts of the Sixteenth General Assembly, and chapter 179, acts of the Twentieth General Assembly..... Took effect by publication, May 8, 1890.	.....	3329*a*
48	An act to protect employees and laborers in their claims for wages..... Took effect July 4, 1890.	.....	4307*a*

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CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
49	An act to provide for temporarily filling vacancy in the office of county recorder. Took effect by publication, April 4, 1890.	.....	471*a*
50	An act providing for the appointment of state bank examiners, fixing their fees and the payment of the same. Took effect by publication, April 30, 1890.	.....	1825*a*, 1825*b*
51	An act concerning the printing of the biennial report of the commissioner of the bureau of labor statistics. (Section 11 of chapter 82, acts Twenty-second General Assembly.). Took effect July 4, 1890.	.....	125
52	An act in relation to the printing, binding and distribution of public reports. Took effect July 4, 1890.	1 2 3 4 5	125 126 Omitted. 2543 2515
54	An act to amend section 1, chapter 92, acts of the Nineteenth General Assembly. Took effect July 4, 1890.	.....	2749
55	An act to amend sections 1695 and 1696, chapter 7, title XII of the Code, relating to the Iowa Institution for the Deaf and Dumb. Took effect by publication, April 26, 1890.	.....	2779, 2780
56	An act to amend section 9, of chapter 40, acts of the Nineteenth General Assembly in relation to the Institution for Feeble-minded Children at Glenwood. Took effect by publication, April 18, 1890.	.....	2717
57	An act to amend chapter 154, Laws of the Eighteenth General Assembly, regulating the good time of prisoners in our penitentiaries. Took effect July 4, 1890.	.....	6210*a*–6210*e*
58	An act to amend section 1, of chapter 121 of the Laws of the Twenty-second General Assembly. Took effect by publication, May 16, 1890.	.....	2800

TWENTY-FOURTH GENERAL ASSEMBLY (1892).

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
1	An act to establish a board of park commissioners in certain cities of the first class, defining their powers and prescribing their duties. Took effect by publication, March 25, 1892.	.....	902*a*–902*j*
2	An act to amend an act entitled "An act to establish a board of park commissioners in certain cities of the first class, defining their powers and prescribing their duties." Passed March 24, 1892, and approved March 25, 1892. Took effect by publication, April 16, 1892.	.....	902*a*
3	An act amending section 1, of chapter 1, of the acts of the Twenty-second General Assembly, entitled "An act creating in all cities of the first class, having a population according to any legally authorized census, of more than thirty thousand inhabitants, a board of public works and defining the powers and duties of its members". Took effect July 4, 1892.	.....	881*a*
4	An act granting additional powers to cities organized under special charters. Took effect by publication, March 30, 1892.	.....	960*b*

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CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
5	An act to allow any city or town of less than eight thousand inhabitants, in which a superior court is now established, to abolish the same in the manner prescribed by this act.. Took effect July 4, 1892.	.....	786a, 786b
6	An act to enable the inhabitants of two counties lying contiguous to each other to organize into a city or incorporated town, and defining the jurisdiction of mayors thereof..... Took effect by publication, March 30, 1892.	1 2	578a 693a
7	An act to provide for the compensation of mayors of cities of the second class and incorporated towns, when performing the duties of justices of the peace..... Took effect July 4, 1892.	.....	693b
8	An act to amend chapter 54, of the acts of the Sixteenth General Assembly, relating to the construction of sewers in cities organized under special charters..... Took effect by publication, April 5, 1892.	.....	943
9	An act amending sections 11 and 12, of chapter 14, of the laws of the Twenty-third General Assembly..... Took effect by publication, April 5, 1892.	.....	750k, 750l
10	An act to abolish the office of township clerks and township trustees in certain cities..... Took effect July 4, 1892.	.....	526a–526e
11	An act granting cities of the second class in the state, all the powers and provisions of chapter 162 of the Laws of the Seventeenth General Assembly, chapter 25, Laws of the Twentieth General Assembly, and chapter 7 of the Laws of the Twenty-second General Assembly, relating to the construction of sewers in cities of the first class..... Took effect by publication, April 6, 1892.	.....	793a–793c
12	An act to repeal section 1, of chapter 14, acts of the Twenty-third General Assembly, and enacting a substitute therefor: making the provisions of said chapter applicable to all cities containing a population of over four thousand, and all cities organized and existing under special charters..... Took effect by publication, April 5, 1892.	.....	750a
13	An act to amend chapter 15 of the acts of the Twenty-third General Assembly in relation to special taxes for the improvement of streets in cities existing under special charters, having a certain population..... Took effect by publication, March 29, 1892.	.....	960a
14	An act providing for funding indebtedness evidenced by warrants, and the refunding of bonded indebtedness of incorporated towns, and for the levy of taxes for the payment thereof, and fixing a penalty for the diversion of such tax..... Took effect July 4, 1892.	.....	707a–707h
15	An act amending section 1, of chapter 17, of the Laws of the Twenty-second General Assembly, relating to funding outstanding indebtedness of cities..... Took effect by publication, March 22, 1892.	.....	755
16	An act to amend section 289 and 290 of the Code of 1873 as amended by chapter 26 of the Laws of the Twenty-third General Assembly of the state of Iowa, relating to the bonding of county indebtedness..... Took effect by publication, March 15, 1892.	.....	876, 877
17	An act to apply the provisions of chapter 58, Seventeenth General Assembly and amendments thereto, to existing bonded indebtedness of counties, cities and towns..... Took effect July 4, 1892.	.....	868

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CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
18	An act to amend chapter 159 of the acts of the Twentieth General Assembly of the state of Iowa, to repeal sections 3 and 4 thereof, and to enact substitutes for said sections. Took effect by publication, April 27, 1892.	.....	2082, 2084
19	An act to amend section 1752, Code of 1873. Took effect July 4, 1892.	.....	2867
20	An act to make the time for which sub-directors of schools are elected, three years. Took effect July 4, 1892.	.....	2825a–2825c
21	An act to amend chapter 9, title XII of the Code of 1873, by adding thereto, providing for calling in certain contingencies meetings of independent districts. Took effect by publication, March 26, 1892.	.....	2933a
22	An act to amend section 1, chapter 21, of the Laws of the Twenty-third General Assembly of the state of Iowa. Took effect by publication, April 16, 1892.	.....	1947
23	An act to amend chapter 18, of the laws of the Twenty-third General Assembly. Took effect by publication, April 9, 1892.	1–4 5	5419a–5419d 5419g
24	An act to define the residence of any ex-soldier, sailor or marine who may be discharged from the Iowa Soldiers' Home, and to fix liability of expenses in certain cases. Took effect July 4, 1892.	.....	2802a, 2802b
25	An act to amend chapter No. 17 of the acts of the Twenty-third General Assembly. Took effect by publication, April 16, 1892.	.....	2080c
26	An act to amend chapter 81 of the Laws of the Twenty-second General Assembly, relative to change of name of railway stations. Took effect July 4, 1892.	.....	2096
27	An act to amend section 22, of chapter 28, of the acts of the Twenty-second General Assembly, relating to reports to be made to the Board of Railroad Commissioners. Took effect July 4, 1892.	.....	2070
28	An act to amend section 1182, of the Code of 1873 and exempting funds realized from life insurance from debts. Took effect July 4, 1892.	.....	1756
29	An act to amend section 1182 of the Code of Iowa as to insurance. Took effect by publication, March 26, 1892.	.....	1695
30	An act to amend section 9, chapter 65, acts of the Twenty-first General Assembly. Took effect by publication, April 29, 1892.	.....	1769
31	An act to amend the military code and to increase the efficiency of the national guard. Took effect by publication, April 2, 1892.	.....	1557–1606a
32	An act to authorize the loan of certain arms and accoutrements to military schools and colleges in the state of Iowa. Took effect by publication, April 16, 1892.	.....	1607a, 1607b
33	An act to provide for the printing and distribution of ballots at public expense, and for the nomination of candidates for public offices; to regulate the manner of holding elections and to enforce secrecy of the ballot. Took effect July 4, 1892.	.....	1063a–1063d

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CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
34	An act to amend sections 2623 and 2624, chapter 6, title XVII, of the Code, relating to notice to unknown defendants Took effect by publication, April 16, 1892.	.....	3329, 3330
35	An act to amend section 853, chapter 1, title VI, of the Code, relating to the lien of taxes between vendor and vendee Took effect July 4, 1892.	.....	1335
36	An act to protect persons, associations and unions of workingmen and others, in their labels, trade-marks and forms of advertising Took effect by publication, April 5, 1892.	.....	5445*a*-5445*h*
37	An act to repeal section 1487 and 1488 of the Code, and enact substitutes therefor Took effect July 4, 1892.	.....	2286, 2287
39	An act punishing the crime of sodomy Took effect by publication, March 30, 1892.	.....	5341*a*
40	An act requiring owners of Osage orange hedge fences, to keep the same trimmed along the public highways and railroads Took effect July 4, 1892.	.....	1509*a*-1509*c*
41	An act to amend section 203 of the Code as amended by chapter 82, Laws of the Twenty-second General Assembly, relative to reports of the clerks of court Took effect July 4, 1892.	.....	264
42	An act to amend section 1967 of the Code of 1873, relative to defective acknowledgment of deeds, mortgages and other instruments in writing Took effect July 4, 1892.	.....	3141*a*
43	An act to amend section 1 of chapter 105, acts of the Twentieth General Assembly of Iowa, relative to civil rights Took effect July 4, 1892.	.....	5386
44	An act authorizing corporations and persons engaged in the slaughtering and packing business to issue certificates and warehouse receipts on their own products, while in their custody and control Took effect by publication, April 16, 1892.	.....	3363*a*-3363*f*
45	An act to amend sections 995 and 4062 of the Code of 1873, relative to the extermination of thistles Took effect July 4, 1892.	1 2	1509 5423
46	An act to amend section 1 of chapter 63, of the acts of the Twenty-first General Assembly, as amended by chapter 108 of the acts of the Twenty-second General Assembly, relative to the maintenance of fish dams across the outlets of meandered lakes Took effect by publication, April 5, 1892.	.....	2619
47	An act for the preservation of the health of female employees Took effect July 4, 1892.	.....	5379*a*-5379*d*
48	An act to amend section 1432 of the Code as amended by chapter 76, Laws of the Twenty-second General Assembly: to authorize the transfer of patients from one hospital for the insane to another Took effect by publication, April 16, 1892.	.....	2285
49	An act to provide for the appointment of sheep inspectors and prescribing their duties Took effect July 4, 1892.	.....	2293*a*-2293*f*

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CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
50	An act to repeal section 4042 of the Code of 1873 and provide a substitute therefor, and to enlarge the duties and powers of the state dairy commissioner, and to provide an appropriation therefor..... Took effect July 4, 1892.	1–5 6 7, 8 9	5363–5363*d* 2514*a* 5363*e*, 5363*f* Omitted.
51	An act relating to the Industrial Home for the Blind at Knoxville; to the board of commissioners thereof, and providing trustees therefor..... Took effect by publication, April 5, 1892.	.....	2768*a*–2768*i*
52	An act to amend chapter 185 of the acts of the Twentieth General Assembly as amended by chapter 149 of the acts of the Twenty-first General Assembly, and by chapter 82 of the Laws of the Twenty-second General Assembly, in relation to the inspection of coal oil..... Took effect by publication, April 5, 1892.	1 2–4	2484, 2486, 2487 2486*a*–2486*c*
53	An act to increase the number of judges in the second judicial district..... Took effect by publication, March 26, 1892.	1 2	235 236*a*
54	An act amending chapter 134 of the acts of the Twenty-first General Assembly, and to increase the number of district judges in the fourth judicial district..... Took effect by publication, April 9, 1892.	1 2–4	235 236*b*–236*d*
55	An act to increase the number of judges in the seventh judicial district..... Took effect by publication, March 26, 1892.	1 2	235 236*e*
56	An act to promote historical collections in the capitol of the state..... Took effect by publication, April 16, 1892.	.....	3072*a*–3072*h*
57	An act providing for the collection and tabulation of statistics of crops and live stock..... Took effect July 4, 1892.	.....	1308*a*–1308*c*
58	An act to provide for holding farmers' institutes in the state of Iowa, and providing for the expenses thereof..... Took effect July 4, 1892.	.....	1684*a*–1684*c*
59	An act to amend chapter 151 acts of the Eighteenth General Assembly in relation to local boards of health..... Took effect by publication, April 7, 1892.	.....	2573
60	An act to amend section 1 of chapter 158 of the Laws of the Twenty-first General Assembly, relative to the salary of third assistant librarian in the state library..... Took effect by publication, April 15, 1892.	.....	3062
62	An act to provide for the publication of the proceedings of the Iowa Academy of Sciences..... Took effect by publication, March 24, 1892.	.....	1680*a*
63	An act providing for the support of the Iowa weather and crop service, and the publication of an increased number of copies of the Monthly Review..... Took effect by publication, April 16, 1892.	1 2	Omitted. 2448*e*
64	An act to provide for the printing and distribution of the "Iowa Official Register"..... Took effect July 4, 1892.	.....	74*a*–74*c*
65	An act to change the name of the Iowa institution for the education of the deaf and dumb to the Iowa School for the Deaf..... Took effect by publication, April 16, 1892.		2769*a*, 2769*b*

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66	An act to protect the public from fraudulent pedigrees of live stock..... Took effect by publication, April 15, 1892.	.....	2280*a*
67	An act to protect the breeders of trotting and pacing horses and fair associations of the state of Iowa ..... Took effect by publication, April 15, 1892.	.....	1677*a*–1677*d*
68	An act to protect persons and property from danger from steam engines on public highways ..... Took effect July 4, 1892.	.....	1514*a*–1514*d*
69	An act to amend chapter 105 of the laws of the Twenty-second General Assembly, relative to the relief of Union soldiers, sailors and marines..... Took effect July 4, 1892.	.....	416, 418
71	An act to provide for a geological survey of the state of Iowa..... Took effect by publication, April 16, 1892.	.....	Pages 347, 348
79	An act fixing the number of senators in the general assembly, apportioning them among the several counties according to the number of inhabitants in each, and dividing the state into senatorial districts..... Took effect July 4, 1892.	.....	Pages 341, 342
80	An act to apportion the state into representative districts and declaring the ratio of representation..... Took effect July 4, 1892.	.....	Pages 343–346

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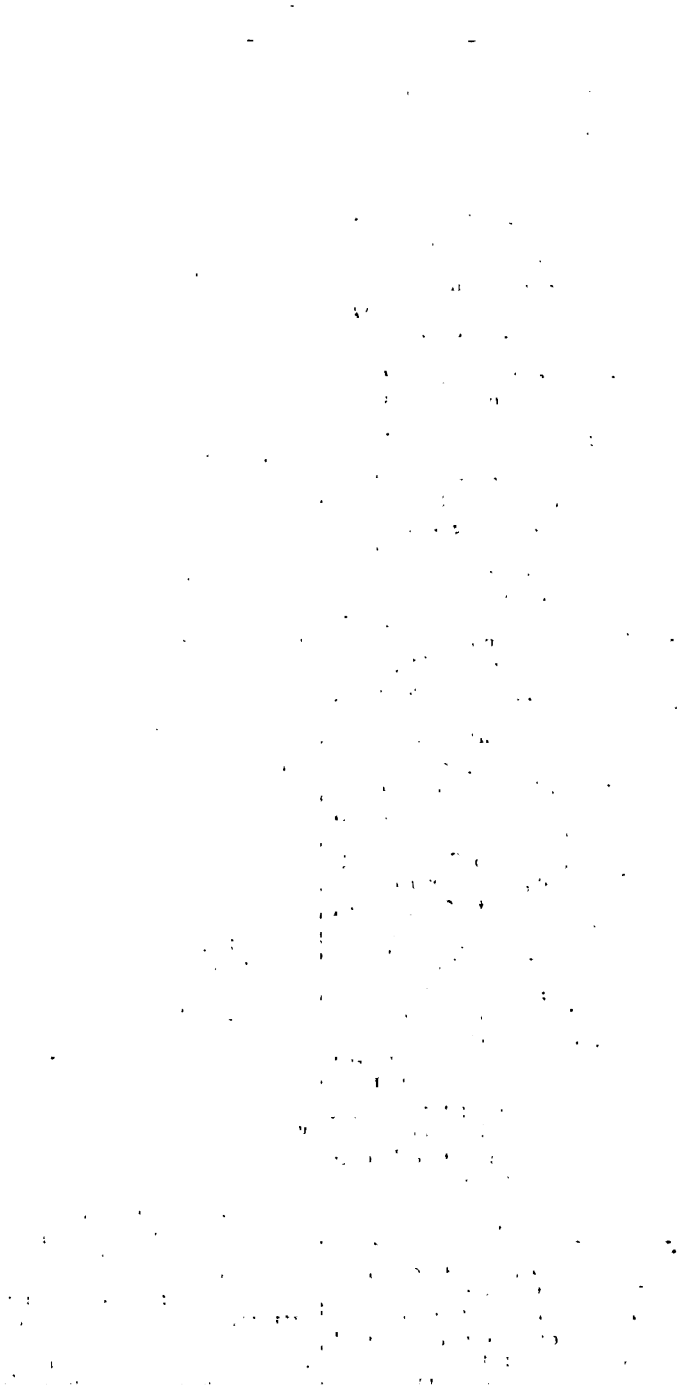

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